Supreme Court, U.S.
FILED
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87-472

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,

Petitioners,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, and The Fidelity Standard Life Insurance Company,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N. V., a Netherland Antilles corporation, Plaintiffs-Appellants, vs. HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40, Defendants-Appellees, and THE FIDELITY STANDARD LIFE INSURANCE COMPANY, INTERVERNOR-DEFENDANT/APPELLEE.

NO. 11353

APPEAL FROM FIRST CIRCUIT COURT

HONORABLE EDWIN Y. SASAKI, JUDGE
HONORABLE PHILIP T. CHUN, JUDGE

(CIVIL NO. 70332)

APRIL 3, 1987

BURNS, C.J., HEEN AND TANAKA, JJ.

DISMISSAL AND NONSUIT—involuntary—want of prosecution.

Dismissals with prejudice are not favored, and appellate courts will uphold such a sanction by the trial court only when there is a clear record of delay or contumacious conduct, and where lesser sanctions would not serve the best interests of justice.

SAME—same—same.

No precise rule can be laid down as to what circumstances justify a dismissal for failure to prosecute, but the procedural history of each case must be examined in order to make that determination. The power of the court to prevent undue delays and to achieve the orderly disposition of cases must be weighed

against the policy of law which favors disposition of litigation on its merits.

SAME—same—same—Rule 41(b), Hawaii Rules of Civil Procedure (HRCP) (1980).

Where on the day of trial plaintiffs did not appear, but the defendants appeared with counsel and the jury panel was present, plaintiffs' counsel informed the trial judge that plaintiffs had instructed him "not to participate in this proceeding" because they were being "deprived of their consitutional right to trial by jury and to a judge who is impartial," and plaintiffs' counsel then left the courtroom, plaintiffs effectively abandoned their cause of action and the trial court correctly dismissed plaintiffs' complaint with prejudice under Rule 41(b), HRCP.

APPEAL AND ERROR—review—interlocutory, collateral, and supplementary proceedings and questions—on appeal from final judgment—interlocutory proceeding brought up in general.

Where an appellate court affirms the trial court's dismissal of a complaint with prejudice for want of prosecution, it will not review alleged errors by the trial court occurring prior to the order or dismissal which were relied upon by appellants as their reason for refusing to proceed with their cause of action.

JUDGMENT—by default—requisites and validity—absence at trial or other proceeding—Rule 55(b) (2), HRCP.

Where on the day of trial the trial court dismissed the plaintiffs' complaint for lack of prosecution, it did not err in entering a default against plaintiffs' on defendants' counterclaims, allowing proof of defendants' damages, and entering default judgments in favor of defendants.

JUDGMENT—by default—opening or setting aside default—discretion of court—Rule 60(b), HRCP.

The function of an appellate court in an appeal from the trial court's refusal to set aside a default judgment is to determine whether the trial court failed to set aside a void judgment or abused its discretion.

OPINION OF THE COURT BY HEEN, J.

Plaintiffs-Appellants Leon D. Richardson and his wife, Margie J. Richardson (hereinafter the Richardsons), and Copthorne N.V. (Copthorne), a Netherland Antilles corporation (hereinafter where appropriate the Richardsons and Copthorne will be referred to collective as Plaintiffs), appeal from the order dismissing their complaint against Defendants-Appellees Howard T. Lane (Lane), Willis Sinsabaugh (Sinsabaugh), and Waterfront Properties, Inc. (Waterfront), a Hawaii corporation (hereinafter where appropriate Lane, Sinsabaugh and Waterfront will be referred to collectively as Defendants), and from the default judgments entered against them on the counterclaims of Lane and Sinsabaugh. We affirm.

This case began as a dispute between the parties over structural deficiencies in a residence purchased by the Richardsons from Lane[1] under an agreement of sale (agreement) which was later assigned to Copthorne. After the complaint, counterclaims against Plaintiffs by Lane for default on the agreement by Lane and Sinsabaugh for defamation, and cross-claims between Lane and Sinsabaugh and Waterfront were filed, trial was scheduled for January 21, 1985. Meanwhile, the matter had deteriorated into a battle over discovery proceedings.

On January 16, 1985, as as result of the most current discovery proceedings dispute between Plaintiffs and Defendants, Lane filed a motion seeking, *inter alia*, (1) dismissal of the complaint; (2) default judgment against Plaintiffs on Lane's counterclaim; and (3) preclusion of the testimony of three of Plaintiffs' expert witnesses. The motion was heard on January 17, 1985, and on that day the trial court orally ordered that Plaintiffs' three experts would be precluded from testifying. Also on January 17, 1985, Lane filed another motion to dismiss alleging that Plaintiffs had failed to comply with a January 14, 1985 order that they deposit in court a sum equal to all payments that had not been made by them under the agreement. This motion was heard on January 18, 1985, and on the same day the trial court orally ordered Plaintiffs to deposit with the court $743,750 cash or other security by 9:30 a.m.,

[1]Waterfront Properties, Inc., was the real estate sales firm that handled the sale, and Willis Sinsabaugh was its agent-employee.

January 21, 1985, the day of trial. Written orders denying the dismissals and the default judgment but granting the motion to preclude Plaintiffs' three experts from testifying and requiring Plaintiffs to deposit $743,750 with the court were entered on January 28, 1985.

On the morning of trial, the jury panel was present and Defendants appeared with their attorneys. Plaintiffs' attorney was present, but Plaintiffs were not. Plaintiffs' counsel filed an "Affidavit of Leon D. Richardson Disqualifying the Honorable Edwin Y. Sasaki" (Judge Sasaki), who had presided over Lane's dismissal motions and who was to be the trial judge. Judge Sasaki refused to disqualify himself. Plaintiffs' counsel then told Judge Sasaki that Plaintiffs were unable to proceed to trial because of the sanctions imposed by Judge Sasaki and Judge Sasaki's refusal to disqualify himself. Judge Sasaki ordered the trial to proceed and directed the clerk to call the roll of the jurors. Plaintiffs' counsel then requested a bench conference at which he stated that Plaintiffs had instructed him "not to participate in this proceeding" because they were "being deprived of their constitutional right to trial by jury and to a trial judge who is impartial[.]" At the end of the bench conference, Plaintiffs' counsel left the courtroom. The trial court thereupon orally dismissed the complaint on its merits, dismissed the cross-claims between Lane and Sinsabaugh and Waterfront, entered a default against Plaintiffs on Lane's and Sinsabaugh's counterclaims, and allowed Defendants to present proof of damages. On January 24, 1985, the court entered findings of fact and conclusions of law, a judgment in favor of Lane and Sinsabaugh, and a separate judgment in favor of Sinsabaugh and Waterfront.[2]

The judgments (1) dismissed the complaint against all Defendants with prejudice; (2) cancelled the agreement of sale and terminated all of Plaintiffs' right, title and interest in the property; (3) authorized Lane to retain all sums paid under the agreement of sale; (4) awarded Lane and Sinsabaugh $1.00 on their counterclaims for defamation; (5) ordered issuance of a writ of

[2]The Fidelity Standard Life Insurance Company, as the first mortgagee of the premises in dispute, was allowed to intervene on July 23, 1984. On January 17, 1985, an order was entered granting the intervenor's motion to declare its mortgage as having first priority and granting a separate trial of its cross-claims against Howard T. Lane.

possession to Lane; and (6) granted Defendants leave to move for attorney's fees.

On February 4, 1985, Plaintiffs filed a motion seeking (1) relief from the order dismissing the complaint and from the judgment, (2) a new trial, and (3) a stay of the judgment. After a hearing, which was attended by Plaintiffs' counsel, the motion was denied on February 26, 1985. Meanwhile, on February 19, 1985, Plaintiffs filed a motion to vacate the default judgment, the order of dismissal, and the order precluding Plaintiffs' expert witnesses' testimony, which was denied on March 19, 1985.

During the period when Plaintiffs were attacking the dismissals and judgment, Defendants moved for costs and attorney's fees and gave notice of their motions to Plaintiffs' counsel. Although neither Plaintiffs nor their counsel appeared at the hearings on the motions, they did file written objections on "jurisdictional and constitutional grounds." On March 6, and 19, 1985, respectively, Lane's motion and Sinsabaugh's and Waterfront's motion for award of attorney's fees were granted.

Plaintiffs filed notices of appeal on February 25, 1985, and on April 18, 1985, which were both dismissed on jurisdictional grounds on December 31, 1985. On May 6, 1986, Plaintiffs filed another notice of appeal.

The following three questions are determinative of this appeal:

(1) Did the trial court err in dismissing Plaintiffs' complaint?

(2) Did the trial court err in entering default judgments in favor of Defendants on their counterclaims?

(3) Did the trial court err in denying Plaintiffs' motion to set aside the order dismissing its complaint and the default judgments?

We find no error. Additionally, for reasons discussed below we will not consider any alleged errors that occurred prior to dismissal of the complaint. Other matters raised by Plaintiffs on appeal are utterly without merit and will not be discussed.

I.

When Plaintiffs' counsel informed the trial court that Plaintiffs had instructed him not to participate further in the proceedings and left the courtroom, Plaintiffs effectively abandoned their cause of action and the trial court correctly dismissed the complaint under

Rule 41(b), Hawaii Rules of Civil Procedure (HRCP) (1980),[3] for lack of prosecution.

Dismissals with prejudice are not favored, *see Lim v. Harvis Construction, Inc.*, 65 Haw. 71, 647 P.2d 290 (1982), and appellate courts will uphold such a sanction by the trial court only "when there is a 'clear record of delay or contumacious conduct . . . and where lesser sanctions would not serve the best interests of justice.'" *Bagalay v. Lahaina Restoration*, 60 Haw. 125, 132, 588 P.2d 416, 422 (1978) (quoting *Boazman v. Economics Laboratory, Inc.*, 537 F.2d 210, 212 (5th Cir. 1976)), 9 Wright & Miller, Federal Practice and Procedure: *Civil* § 2369, at 195 (1971). A party's refusal to proceed with trial is cause for dismissal of his complaint. 9 Wright & Miller, *supra*, § 2370, at 209–210; *Michelson v. Moore-McCormack Lines, Inc.*, 429 F.2d 394 (2nd Cir. 1970); *Thompson v. Fleming*, 402 F.2d 266 (5th Cir. 1968); *Hooper v. Chrysler Motors Corp.*, 325 F.2d 321 (5th Cir. 1963); *cert. denied*, 377 U.S. 967, 84 S.Ct. 1647, 12 L.Ed.2d 736 (1964).

A case factually similar to the case at bar is *Marshall v. Sielaff*, 492 F.2d 917 (3d Cir. 1974). There, the plaintiff, on the day of trial and against the advice of his lawyer, refused to proceed to trial on his civil rights complaint because the trial judge had denied his petition for writs of *habeas corpus ad testificandum* for the

[3]Rule 41(b), Hawaii Rules of Civil Procedure (HRCP) (1980), provides:

Rule 41. DISMISSAL OF ACTIONS.

* * *

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

appearance of three of his fellow prison inmates as plaintiffs' witnesses, claiming those witnesses were essential to his case. The trial court granted the defendant's motion for dismissal for lack of prosecution and the appellate court affirmed. Observing that

> [n]o precise rule can be laid down as to what circumstances justify a dismissal for failure to prosecute, but the procedural history of each case must be examined in order to make that determination. The power of the court to prevent undue delays and to achieve the orderly disposition of cases must be weighed against the policy of law which favors disposition of litigation on its merits[,]

id., at 918, the court held:

> From a careful consideration of history of this litigation and from all the surrounding circumstances, we hold that the district court's dismissal of plaintiff's case for lack of prosecution was not an abuse of discretion. Indeed, appellant left the district judge no choice. The appellant refused to proceed with the trial because of the court's adverse decision on his motion for issuance of a writ *ad testificandum* for the three inmates at Graterford, despite the advice of his counsel that the "proper procedure" was to proceed. Both the appellant and Rayford Smith were present, having been transferred by the prison authorities to the courthouse. The issues in the case may well have been resolved without the other inmate witnesses. If appellant had proceeded, he might have been successful. If appellant had proceeded and lost, the appellate court would have a complete record upon which to make its determination.
>
> For these reasons we affirm the dismissal for lack of prosecution and do not reach the substantive issue involving the denial of the write of habeas corpus *ad testificandum*. To adjudicate the issue of the writ under the circumstances of this case would undermine the "basic and persisting policy against piecemeal appeals." *Cf. Borden Co. v. Sylk*, 3 Cir. 1969, 410 F.2d 843; *Kelly v. Greer*, 3 Cir. 1961, 295 F.2d 18; *Panichella v. Pennsylvania Railroad Co.*, 3 Cir. 1958, 252 F.2d 452, 454. If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure

> to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened. This procedural technique would in effect provide a means to avoid the finality rule embodied in 28 U.S.C.A. § 1291. To review the district court's refusal to grant the writ under the facts of this case is to invite the inundation of appellate dockets with requests for review of interlocutory orders and to undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases.

Id. at 919.

We adopt the reasoning of *Marshall* and apply it to the instant case. By refusing to proceed with the trial, Plaintiffs left the trial court no choice but to dismiss their complaint. Plaintiffs' argument that the preclusion order was destructive of their case carries no weight against the record here. There is no way we can evaluate the effect of the order because Plaintiffs' refusal to proceed has left us without a record of the remainder of their proof. Finally, as stated above, we will not discuss alleged errors that occurred prior to the dismissal of the complaint, as to do so would be contrary to this jurisdiction's policy against piecemeal appeals.[4] *Doe V v. Roe V*, 5 Haw. App. 610, 704 P.2d 940 (1985).

We point out that we do not deem it fatal to the trial court's decision that it acted *sua sponte* rather than on a motion to dismiss from Defendants. We are aware that in *Lim v. Harvis Construction, Inc.*, 65 Haw. 71, 647 P.2d 290 (1982), the supreme court held that dismissal under Rule 41(b) requires a motion, notice and hearing. However, the circumstances in that case were vastly different from those in the case at bar. In *Lim* the court's order of dismissal was based only on a letter from defense counsel. Here, Plaintiffs' intentions were announced by their counsel in court before he exited. A formal motion, notice, and hearing would have been superfluous. Moreover, a fair inference from the record is that Plaintiffs and their counsel would not have appeared at such a hearing.

[4]The transcript of the January 21, 1985 hearing indicates that Plaintiffs' counsel orally requested permission to take an interlocutory appeal, which was denied.

II.

Plaintiffs contend the default judgment is in error because they were not given any notice of the hearing on the application for default judgment on Defendants' counterclaims, as required by Rule 55(b) (2), HRCP (1980).[5] The argument is specious. The same actions by Plaintiffs that justified the dismissal justified the trial court in declaring the default and rendering the default judgment. Defendants were present with their witnesses, and in light of all the circumstances, there was no conceivable reason for the trial court to refuse to proceed with Defendants' proof. Moreover, we see no reason why Plaintiffs might have thought that their exit from the courtroom would deprive the trial court of its jurisdiction and authority to act.

> While the failure to give the required notice is generally regarded as a serious procedural irregularity that may afford the basis for reversal on appeal, or for relief under an appropriate clause of Rule 60(b) and in conjunction with other irregularities may render the judgment void, the error should not usually be treated as so serious as to render the judgment void. It should be considered in light of surrounding circumstances and will, at times, be harmless.

7 Moore's Federal Practice ¶ 60.25[2], at 60-238 (2d ed. 1985) (footnotes omitted). *Cf. Blois* v. *Friday*, 612 F.2d 938 (5th Cir. 1980).

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[5]Rule 55(b) (2), HRCP (1980), provides:

> Rule 55. DEFAULT.
>
> (b) Judgment. Judgment by default may be entered as follows:
>
> * * *
>
> (2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian, or other such representative who has appeared therein, and upon whom service may be made under Rule 17. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute.

Here, the surrounding circumstances render the procedural error harmless.[6]

III.

Plaintiffs argue that the trial court abused its discretion in refusing to set aside the dismissal and the default judgments, citing Rule 60(b), HRCP (1980).

The function of an appellate court in an appeal from the trial court's refusal to set aside a default judgment "is to determine whether the district court failed to set aside a void judgment or abused its discretion." *Textile Banking Co., Inc. v. Rantschler*, 657 F.2d 844, 850 (7th Cir. 1981). There is nothing in the record to render the judgment void, and the circumstances clearly indicate no abuse of discretion by the trial court in denying Plaintiffs' motion to vacate the dismissal and the default judgments.

Although the findings of fact and conclusions of law and the judgments were not submitted to Plaintiffs' counsel for approval as to form as required by Rule 21, Rules of the Circuit Court (RCC) (1971), those documents do not vary from the record and Plaintiffs were not prejudiced. *Cf. Baldwin v. Hawaiian Agronomics Co.*, 53 Haw. 447, 496 P.2d 9 (1972). The record does show that notices of the entry of those documents were sent to Plaintiffs on January 24, 1985. In our view, the failure to comply with Rule 21, RCC, does not, in the circumstances of this case, render the order of dismissal or the judgments void, and the trial court did not abuse its discretion in denying Plaintiffs' Rule 60(b) motions. *Isemoto Contracting Co., Ltd. v. Andrade*, 1 Haw. App. 202, 616 P.2d 1022 (1980).

Finally, in view of the circumstances of this case, we do not consider that the *ex parte* meeting between the trial court and defense counsel to settle the forms of the orders and judgments to be entered requires reversal here. The ensuing orders and judgments comport with all of the prior proceedings and rulings

[6]Contrary to Plaintiffs' argument, they were not entitled to a jury trial on damages. 10 Wright, Miller & Kane, Federal Practice and Procedure: *Civil* § 2688 (1983).

and indicate that Plaintiffs were not prejudiced by that *ex parte* meeting.

Affirmed.

GARY VICTOR DUBIN for plaintiffs-appellants.

MICHAEL W. GIBSON (LORRIN B. HIRANO with him on the brief; ASHFORD & WRISTON OF COUNSEL) for Lane.

CATHY A. LEE (WESLEY W. ICHIDA with her on the brief; CASE, KAY & LYNCH OF COUNSEL) for Sinsabaugh and Waterfront.

JAMES A. BURNS

WALTER M. HEEN

HARRY L. TANAKA

No. 11353

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants-Appellees,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor-Defendant/ Appellee.

CIVIL NO. 70332

ORDER PARTIALLY GRANTING MOTION FOR RECONSIDERATION

This court having considered Plaintiffs-Appellants' motion for reconsideration of the opinion rendered on April 3, 1987, and their

arguments in support thereof, the motion is hereby granted only with respect to Plaintiffs-Appellants' argument that the opinion erroneously affirmed the March 19, 1985 order of the trial court awarding Defendants-Appellees Willis Sinsabaugh and Waterfront Properties, Inc., costs and attorney's fees under Rule 68, Hawaii Rules of Civil Procedure (1980). We find no merit in Plaintiffs-Appellants' other arguments in support of the motion.

DATED: Honolulu, Hawaii, April 22, 1987.

GARY VICTOR DUBIN
on the motion for
plaintiffs-appellants.

JAMES A. BURNS

WALTER M. HEEN

HARRY T. TANAKA

No. 11353

IN THE INTERMEDIATE COURT OF APPEALS
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LEON D. RICHARDSON and
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Plaintiffs-Appellants,

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CIVIL NO. 70332

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,

Defendants-Appellees,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,

Intervenor-Defendant/ Appellee.

ORDER AMENDING OPINION OF THE COURT

Upon consideration of Plaintiffs-Appellants' motion for consideration, and good cause appearing therefore, IT IS HEREBY ORDERED that the opinion of this court entered on April 3, 1987, is amended in the following respects:

(1) The first paragraph of the opinion is amended to read as follows:

> Plaintiffs—Appellants Leon D. Richardson and his wife, Margie J. Richardson (hereinafter the Richardsons), and Copthorne N.V. (Copthorne), a Netherland Antilles corporation (hereinafter where appropriate the Richardsons and Copthorne will be referred to collectively as Plaintiffs), appeal from the order dismissing their complaint against Defendants-Appellees Howard T. Lane (Lane), Willis Sinsabaugh (Sinsabaugh), and Waterfront Properties, Inc. (Waterfront), a Hawaii corporation (hereinafter where appropriate Lane, Sinsabaugh and Waterfront wil be referred to collectively as Defendants), from the default judgments entered against them on the counterclaims of Lane

and Sinsabaugh, and from the trial court's March 19, 1985 order awarding costs and attorney's fees to Sinsabaugh and Waterfront under Rule 68, Hawaii Rules of Civil Procedure (HRCP) (1980). We affirm, except for the order of March 19, 1985, which we order vacated.

(2) The first paragraph of section I of the opinion is amended to read as follows:

When Plaintiffs' counsel informed the trial court that Plaintiffs had instructed him not to participate further in the proceedings and left the courtroom, Plaintiffs effectively abandoned their cause of action and the trial court correctly dismissed the complaint under Rule 41(b), HRCP,[3] for lack of prosecution.

(3) The last paragraph of the opinion is amended to read as follows:

We note also that, in view of the circumstances of this case, we do not consider that the *ex parte* meeting between the trial court and defense counsel to settle the forms of the orders and judgments to be entered requires reversal here. The ensuing orders and judgments comport with all of the prior proceedings and rulings and indicate that Plaintiffs were not prejudiced by that *ex parte* meeting.

(4) The word "Affirmed" appearing at the end of the opinion is stricken and the following language and footnote are added in its stead:

IV.

On March 19, 1985, the trial court ordered Plaintiffs to pay $12,297.49 to Sinsabaugh and Waterfront as costs and attorney's fees they had argued were due them under Rule 68, HRCP.[7] The trial court erred. Rule 68's provision requiring the offeree to pay the offeror's costs and attorney's fees is not applicable in a case where judgment is rendered against the offeree. *See Crown Properties, Inc. v. Financial Security Life Ins. Co.*, 6 Haw. App. ___, 712 P.2d 504 (1985).

[7] HRCP Rule 68 (1980) provides:

OFFER OF JUDGMENT. At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is

The judgment below is affirmed, except for the order of March 19, 1985, which we hereby order vacated.

The clerk of the court is directed to incorporate the foregoing changes in the original opinion.

DATED: Honolulu, Hawaii; April 22, 1987.

GARY VICTOR DUBIN for plaintiffs-appellants.

JAMES S. BURNS

WALTER M. HEEN

MICHAEL W. GIBSON (LORRIN B. HIRANO with him on the brief; ASHFORD & WRISTON OF COUNSEL) for Lane.

HARRY T. TANAKA

CATHY A. LEE (WESLEY W. ICHIDA with her on the brief; CASE, KAY & LYNCH OF COUNSEL) for Sinsabaugh and Waterfront.

(Footnote Continued)
accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

No. 11353

IN THE SUPREME COURT OF THE STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Petitioners-Appellants,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, and WATERFRONT PROPERTIES, INC., a Hawaii corporation,
Respondents-Appellees,

and

JOHN DOES 1-10,, et al.,
Defendants,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Respondent-Intervenor/ Appellee.

CIVIL NO. 70332

APPLICATION FOR WRIT OF CERTIORARI

INTERMEDIATE COURT OF APPEALS

HONORABLE JAMES. S. BURNS, WALTER M. HEEN and HARRY T. TANAKA, Judges

ORDER

Pertitioners-Appellants' Application for Writ of Certiorari filed

May 4, 1987 is hereby denied.

DATED: Honolulu, Hawaii, May 8, 1987.

GARY VICTOR DUBIN
for the writ

FOR THE COURT:
HERMAN T.S. LUM
Chief Justice

No. 11353

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
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Defendants-Appellees,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor/Defendant.

CIVIL NO. 70332

APPEAL FROM THE:
1) ORDER GRANTING IN PART AND DENYING IN PART, DEFENDANT'S MOTION TO DISMISS AND FOR SANCTIONS FILED JANUARY 28, 1985,
2) ORDER DISMISSING COMPLAINT FILED JANUARY 25, 1985,
3) JUDGMENT FILED JANUARY 24, 1985
4) JUDGMENT FILED JANUARY 24, 1985
5) FINDS OF FACT AND CONCLUSIONS OF LAW FILED JANUARY 24, 1985
6) ORDER GRANTING MOTION FOR ORDER TO DEPOSIT PAYMENTS INTO THE COURT FILED JANUARY 14, 1985
7) ORDER MODIFYING AND AMENDING ORDER TO DEPOSIT PAYMENT INTO THE COURT FILED JANUARY 28, 1985,
8) ORDER DENYING PLAINTIFF'S MOTION FOR

Relief from Order Dismissing Complaint and From Judgment for Defendants, for New Trial, and for Stay of Judgment Filed February 26, 1985,
9) Order Granting Defendant Howard T. Lane's Motion for Award of Attorneys Fees Filed March 6, 1985,
10) Order Granting Defendants Willis Sinsabaugh and Waterfront Properties, Inc.'s Motion for Costs and Attorneys' Fees filed March 19, 1985,
11) Order Denying Plaintiffs' Motion for Order Vacating and Setting Aside Default Judgment, Order Dismissing Complaint, and Expert Witness Preclusion Order Filed March 19, 1985 and
12) Ruling Refusing to Disqualify Judge Edwin Y. Sasaki Pursuant to

SECTION 601-7(B)
AFFIDAVIT, FROM ALL
PROCEEDINGS HEREIN,
DECIDED JANUARY 21,
1985, BY JUDGE SASAKI

FIRST CIRCUIT COURT

HONORABLE
EDWIN Y. SASAKI
Judge

HONORABLE
PHILIP T. CHUN
Judge

JUDGMENT ON APPEAL

Of Counsel
ASHFORD & WRISTON

MICHAEL W. GIBSON
LORRIN B. HIRANO
235 Queen Street
P.O. Box 131
Honolulu, Hawaii 96810
Tel. No. 524-4787

Attorneys for Defendants-Appellees
Howard T. Lane, Willis Sinsabaugh
and Waterfront Properties, Inc.

No. 11353

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants-Appellees,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor/Defendant.

CIVIL NO. 70332

JUDGMENT ON APPEAL

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Intermediate Court of Appeals entered herein on April 3, 1987, the Order Partially Granting Motion

for Reconsideration entered herein on April 22, 1987, and the Order Amending Opinion of the Court entered herein on April 22, 1987, the Judgment of the lower court is affirmed, except for the March 19, 1985 Order Granting Defendants Willis Sinsabaugh and Waterfront Properties, Inc.'s Motion for Costs and Attorneys' Fees, which is vacated.

DATED: Honolulu, Hawaii; May 19, 1987.

BY THE COURT:

DARRELL M. PHILLIPS
Of Clerk

APPROVED:

WALTER M. HEEN
Judge

No. 11353

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants-Appellees,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor/Defendant.

CIVIL NO. 70332

APPEAL FROM THE:
1) ORDER GRANTING IN PART AND DENYING IN PART, DEFENDANT'S MOTION TO DISMISS AND FOR SANCTIONS FILED JANUARY 28, 1985,
2) ORDER DISMISSING COMPLAINT FILED JANUARY 25, 1985,
3) JUDGMENT FILED JANUARY 24, 1985
4) JUDGMENT FILED JANUARY 24, 1985
5) FINDS OF FACT AND CONCLUSIONS OF LAW FILED JANUARY 24, 1985
6) ORDER GRANTING MOTION FOR ORDER TO DEPOSIT PAYMENTS INTO THE COURT FILED JANUARY 14, 1985
7) ORDER MODIFYING AND AMENDING ORDER TO DEPOSIT PAYMENT INTO THE COURT FILED JANUARY 28, 1985,
8) ORDER DENYING

Plaintiff's Motion for Relief from Order Dismissing Complaint and From Judgment for Defendants, for New Trial, and for Stay of Judgment Filed February 26, 1985,
9) Order Granting Defendant Howard T. Lane's Motion for Award of Attorneys Fees Filed March 6, 1985,
10) Order Granting Defendants Willis Sinsabaugh and Waterfront Properties, Inc.'s Motion for Costs and Attorneys' Fees filed March 19, 1985,
11) Order Denying Plaintiffs' Motion for Order Vacating and Setting Aside Default Judgment, Order Dismissing Complaint, and Expert Witness Preclusion Order Filed March 19, 1985 and
12) Ruling Refusing to Disqualify Judge Edwin Y. Sasaki Pursuant to

SECTION 601-7(B)
AFFIDAVIT, FROM ALL
PROCEEDINGS HEREIN,
DECIDED JANUARY 21,
1985, BY JUDGE SASAKI

FIRST CIRCUIT COURT

HONORABLE
EDWIN Y. SASAKI
Judge

HONORABLE
PHILIP T. CHUN
Judge

NOTICE OF ENTRY OF JUDGMENT ON APPEAL
CERTIFICATE OF SERVICE

Of Counsel:
ASHFORD & WRISTON

MICHAEL W. GIBSON
LORRIN B. HIRANO
235 Queen Street
P.O. Box 131
Honolulu, Hawaii 96810
Tel. No. 524-4787

Attorneys for Defendants-Appellees
Howard T. Lane, Willis Sinsabaugh
and Waterfront Properties, Inc.

No. 11353

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

v.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants-Appellees,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor/Defendant.

CIVIL NO. 70332

NOTICE OF ENTRY OF JUDGMENT ON APPEAL AND CERTIFICATE OF SERVICE

NOTICE OF ENTRY OF JUDGMENT ON APPEAL

TO: THE HONORABLE PRESIDING JUDGES OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII;

PLEASE TAKE NOTICE that the Intermediate Court of Appeals has entered the following Judgment on Appeal:

> Pursuant to the Opinion of the Intermediate Court of Appeals entered herein on April 3, 1987, the Order Partially Granting Motion for Reconsideration entered herein on April 22, 1987, and the Order Amending Opinion of the Court entered herein on April 22, 1987, the Judgment of the lower court is affirmed, except for the March 19, 1985 Order Granting Defendants Willis Sinsabaugh and Waterfront Properties, Inc.'s Motion for Costs and Attorneys' Fees, which is vacated.

DATED: Honolulu, Hawaii; May 19, 1987.

BY THE COURT:

DARRELL M. PHILLIPS
Of Clerk

The form of the foregoing notice is approved and IT IS ORDERED that the same issue forthwith.

DATED: Honolulu, Hawaii; May 19, 1987.

WALTER M. HEEN
Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within document was duly served by hand delivery on the following persons at their respective addresses shown below.

GARY VICTOR DUBIN, ESQ.
345 Queen Street, Suite 800
Honolulu, Hawaii 96813
Attorney for Plaintiff-Appellants

CATHY A. LEE
Case & Lynch
Suite 2500
Gorsvenor Center, Mauka Tower
737 Bishop Street
Honolulu, Hawaii 96813
Attorney for Defendant-Appellees
Willis Sinsabaugh and
Waterfront Properties, Inc.

DATED: Honolulu, Hawaii; April 23, 1987.

for
LORRIN B. HIRANO

Of Counsel:
ASHFORD & WRISTON

MICHAEL W. GIBSON 1382-0
LORRIN B. HIRANO 3685-0
235 Queen Street
P. O. Box 131
Honolulu, Hawaii 96810
Tel. No. 524-4787

Attorneys for Defendant
HOWARD T. LANE

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON et. al.,	CIVIL NO. 70332
Plaintiffs,	**ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANT'S MOTION TO DISMISS AND FOR SANCTIONS**
vs.	
HOWARD T. LANE, et al., *Defendants.*	

ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANT'S MOTION TO DISMISS AND FOR SANCTIONS

This matter having duly come on for hearing before the Honorable Edwin Y. Sasaki on January 17, 1985, and Plaintiffs and Defendants having been represented by their respective counsel, the Court having heard arguments by counsel and having reviewed the

memoranda filed herein and having been fully advised in the premises, and for good cause shown;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Howard T. Lane's Motion to Dismiss and for Sanctions is granted in part, and denied in part, and Plaintiffs are prohibited from introducing any testimony of or any evidence or exhibits through Jack Lipman, Steve Hidano or Joseph Dobrowolski.

DATED: Honolulu, Hawaii; January 27, 1985.

EDWIN Y. SASAKI (SEAL)
Judge of the above-entitled
Court

APPROVED AS TO FORM:

WESLEY ICHIDA
CATHY A. LEE
Attorney for Defendants
Willis Sinsabaugh and
Waterfront Properties, Inc.

WALTER BEH, II
CHERYL A. NAKAMURA
Attorneys for Intervenor/
Defendant
The Fidelity Standard Life
Insurance Company

GARY VICTOR DUBIN,
attorney for plaintiffs,
did not sign

Of Counsel:
ASHFORD & WRISTON

MICHAEL W. GIBSON 1382-0
LORRIN B. HIRANO 3685-0
235 Queen Street
P. O. Box 131
Honolulu, Hawaii 96810
Tel. No. 524-4787

Attorneys for Defendant
HOWARD T. LANE

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON et. al.,

Plaintiffs,

vs.

HOWARD T. LANE, et al.,

Defendants.

CIVIL NO. 70332

ORDER MODIFYING AND AMENDING ORDER TO DEPOSIT PAYMENTS INTO THE COURT

ORDER MODIFYING AND AMENDING ORDER TO DEPOSIT PAYMENTS INTO THE COURT

This matter having duly come on for hearing before the Honorable Edwin Y. Sasaki on January 18, 1985, and Plaintiffs and Defendants having been represented by their respective counsel, the Court having heard arguments by counsel and having reviewed the memoranda filed herein and having been fully advised in the premises, and for good cause shown;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Order Granting Motion for Order To Deposit Payments Into The Court, entered on January 14, 1985, is modified and amended, and Plaintiffs shall deposit, before 9:30 A.M., January 21, 1985, the sum of $743,750.00 in cash, in cash equivalents, or in such other security of equivalent value and liquidity as this Court may approve, into a trust fund to be accepted and held by the Clerk of the First Circuit Court.

DATED: Honolulu, Hawaii; January 27, 1985.

EDWIN Y. SASAKI (SEAL)
Judge of the above-entitled
Court

APPROVED AS TO FORM:

WESLEY ICHIDA
CATHY A. LEE
Attorney for Defendants
Willis Sinsabaugh and
Waterfront Properties, Inc.

WALTER BEH, II
CHERYL A. NAKAMURA
Attorney for Intervenor/
Defendant
The Fidelity Standard Life
Insurance Company

[GARY VICTOR DUBIN,
Attorney for Plaintiffs,
appended to the order
the statement: "Decline to
sign as the substance and
form of this order are
unconstitutional"]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor/Defendant.

CIVIL NO. 70332

ORDER DISMISSING COMPLAINT

ORDER DISMISSING COMPLAINT

This case having come for jury trial before the Honorable Edwin Y. Sasaki on January 21, 1985 at 9:30 a.m. and GARY V. DUBIN having temporarily appeared for Plaintiffs and MICHAEL W. GIBSON and LORRIN B. HIRANO having appeared for Defendant Howard T. Lane and Cross-Claimants Howard T. Lane and Willis Sinsabaugh, and

WESLEY W. ICHIDA and CATHY A. LEE having appeared for Defendants Willis Sinsabaugh and Waterfront Properties, Inc., and Plaintiffs having failed to appear and their counsel having voluntarily left the courtroom without being excused by the Court after the panel of jurors had been called into the Courtroom and roll call had been taken and prior to commencement of jury selection and Plaintiffs having failed to prosecute or defend thereafter, and all Defendants having been prepared to go forward with the case,

THEREFORE, Plaintiffs' complaint is dismissed with prejudice on the merits and Defendants are given leave to move for taxation of costs and reasonable and proper attorneys' fees against Plaintiffs.

DATED: Honolulu, Hawaii; January 25, 1985.

EDWIN Y SASAKI (SEAL)
Judge of the above-entitled
Court

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants-Appellees,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor/Defendant.

CIVIL NO. 70332

JUDGMENT

JUDGMENT

This cause having come on for proof hearing before the Honorable Edwin Y. Sasaki on January 21, 1985, and proof having been shown to the satisfaction of the Court;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment in favor of Defendants Howard T. Lane and Willis Sinsabaugh is hereby entered as follows:

1. Defendant Howard T. Lane is entitled to possession of the subject premises described in the Complaint and a Writ of Possession against Plaintiffs shall be issued upon presentation by Defendant Howard T. Lane effective forthwith.

2. Complaint is dismissed with prejudice.

3. All right, title and interest of Plaintiffs in the real property designated as 10 Poipu Place is terminated and Defendant Howard T. Lane is permitted to retain all sums paid under the Agreement of Sale between Defendant Howard T. Lane and Plaintiffs Leon D. Richardson and Margie J. Richardson dated June 30, 1981 and the Agreement of Sale is cancelled and any rights of Plaintiffs under the Agreement of Sale or assignments thereof are terminated.

4. Defendants Howard T. Lane and Willis Sinsabaugh are entitled to judgment against Plaintiff Leon D. Richardson in the sum of $1.00 each for Leon D. Richardson's defamatory and tortious conduct.

5. Defendants are given leave to move for taxation of costs and attorneys' fees against Plaintiffs.

DATED: Honolulu, Hawaii; January 23, 1985.

EDWIN Y. SASAKI (SEAL)
Judge of the above-entitled
Court

APPROVED AS TO FORM:

WESLEY W. ICHIDA
CATHY A. LEE
Attorneys for Defendants
Willis Sinsabaugh and
Waterfront Properties, Inc.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON et. al.,
Plaintiffs,

CIVIL NO. 70332

JUDGMENT

vs.

HOWARD T. LANE, et al.,
Defendants.

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor/Defendant.

JUDGMENT

This case having come for jury trial before the Honorable Edwin Y. Sasaki on January 21, 1985 at 9:30 a.m. and GARY V. DUBIN having initially appeared for Plaintiffs and Plaintiffs not having appeared, and MICHAEL W. GIBSON and LORRIN B. HIRANO having appeared for Defendant/Counterclaimant Howard T. Lane and Defendant/Counterclaimant having appeared, and WESLEY W. ICHIDA and CATHY A. LEE having appeared for Defendants Willis Sinsabaugh and Waterfront Properties, Inc. and Willis Sinsabaugh having appeared in both his individual capacity and as the authorized representative of Waterfront Properties, Inc., and Plaintiffs' counsel having voluntarily left the Courtroom without being excused by the Court after the panel of jurors had been called into the Courtroom and roll call had been taken but before jury selection had begun, and Plaintiffs having failed to prosecute or defend thereafter, and all Defendants having been prepared to go forward with the case, the Court having ordered that judgment be entered dismissing Plaintiffs' Complaint with prejudice,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Defendants Willis Sinsabaugh and Waterfront Properties, Inc. and against Plaintiffs as follows:

1. Plaintiffs' Complaint against Defendants Willis Sinsabaugh and Waterfront Properties, Inc. be and the same is hereby dismissed with prejudice and Plaintiffs shall take nothing on their claims against said Defendants; and

2. Defendants Willis Sinsabaugh and Waterfront Properties, Inc. are given leave to move for taxation of costs and reasonable and proper attorneys' fees against Plaintiffs.

DATED: Honolulu, Hawaii; January 24, 1985.

EDWIN Y. SASAKI
Judge of the above-entitled
Court

APPROVED AS TO FORM:

MICHAEL W. GIBSON
LORRIN B. HIRANO
Attorneys for Defendant
Howard T. Lane and
Counter-Claimants Howard
T. Lane and Willis
Sinsabaugh

Of Counsel:
ASHFORD & WRISTON

MICHAEL W. GIBSON 1328-0
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Honolulu, Hawaii 96810
Tel. No.: 524-4787

Attorneys for Defendant
Howrd T. Lane and Cross-
Claimants Howard T. Lane
and Willis Sinsabaugh

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants,

CIVIL NO. 70332

FINDINGS OF FACT AND CONCLUSIONS OF LAW

and

THE FIDELITY STANDARD
LIFE INSURANCE COMPANY,
Intervenor/Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case having come on for jury trial before the Honorable Edwin Y. Sasaki on January 21, 1985 at 9:30 a.m. and GARY V. DUBIN having temporarily appeared for Plaintiffs and MICHAEL W. GIBSON and LORRIN B. HIRANO having appeared for Defendant Howard T. Lane and Cross-Claimants Howard T. Lane and Willis Sinsabaugh, and WESLEY W. ICHIDA and CATHY A. LEE having appeared for Defendants Willis Sinsabaugh and Waterfront Properties, Inc., and Plaintiffs having failed to appear and their counsel having voluntarily left the courtroom without Court approval after jury role was called and prior to commencement of jury selection and Plaintiffs having failed to prosecute or defend thereafter, judgment was entered against Plaintiffs dismissing with prejudice on the merits their complaint and their defenses to Defendants counterclaim and it appearing to the satisfaction of the court that all parties were duly served, and after considering the pleadings and testimony of Howard T. Lane and Willis Sinsabaugh and after hearing statements of counsel, and the Court, being satisfied that it has jurisdiction over all parties and of the subject matter of this case and that the allegations of Defendants' counterclaims are true and that the relief prayed for should be granted, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff COPTHORNE N. V. (hereinafter "Copthorne") is a Netherland Antilles corporation. Plaintiffs LEON D. RICHARDSON and MARGIE J. RICHARDSON (hereinafter "Richardsons") are residents of Hong Kong, and citizens of Australia.

2. Defendants HOWARD T. LANE (hereinafter "Lane") and

WILLIS SINSABAUGH (hereinafter "Sinsabaugh") are residents of the City and County of Honolulu, State of Hawaii.

3. On or about June 30, 1981, Richardsons entered into that certain Agreement of Sale with Defendant Lane for the purchase and sale of Defendant Lane's leasehold interest in certain real property designated as 10 Poipu Place.

4. Richardsons paid to Lane the $500,000 down payment due under the Agreement of Sale and the monthly installments through the January 1982 installment.

5. On or about December 31, 1981, Richardsons assigned to Copthorne their interest in the Agreement of Sale with Lane.

6. Under the terms of the Consent to Assignment, Lane reserved all his rights against Richardsons under the Agreement of Sale including but not limited to recover all sums and expenses incurred to enforce the terms and conditions of the Agreement of Sale including attorneys' fees.

7. Plaintiffs failed to make the monthly installments due under the Agreement of Sale after the January 1982 installment and also failed and refused to make the balloon payment of $850,000 due on January 13, 1983.

8. Plaintiffs were notified that their continuing or future delinquencies in the payments due under the Agreement of Sale constituted a default under the Agreement of Sale.

9. There is a reasonable relationship between the amount of payments retained by Defendant Lane and the amount of Defendant Lane's actual damages which include the interest due during Plaintiffs equitable ownership, the estimated costs of resale of the property, payments other than principal and interest which Plaintiffs failed to make and expenses and damages which Defendant Lane is entitled to under the Agreement of Sale.

10. Plaintiffs acted in bad faith in not repairing the premises and depositing into an escrow or court the funds due under the Agreement of Sale as promised in the letter dated February 8, 1982, from Leon D. Richardson to Howard T. Lane and ordered by this court.

11. On or about February 24, 1982, Plaintiff Leon D. Richardson maliciously prepared and composed a telex and concerning Lane and Sinsabaugh.

12. At the time of said defamatory publication, Plaintiff Leon D. Richardson knew or should have known that the statements made therein were untrue.

13. Defendants Lane and Sinsabaugh have always enjoyed a good reputation for honesty and truthfulness.

14. The act of Plaintiff Leon D. Richardson in publishing the document was willful and intentional and committed for the purpose of harrassing and annoying Defendants Lane and Sinsabaugh.

15. The acts of Plaintiff Leon D. Richardson in publishing the document were reckless, wanton, irresponsible, willful and malicious.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over all the parties in this action and all the claims presented therein.

2. Said Agreement of Sale was and is valid and enforceable according to its terms, without set off, claims or other affirmative defenses.

3. Defendant Howard T. Lane is permitted to retain all sums paid under the Agreement of Sale.

4. Defendant Howard T. Lane is entitled to possession of the premises which are the subject of the Agreement of Sale.

5. A Writ of Possession against Plaintiffs effective forthwith shall issue returning possession to Defendant Howard T. Lane.

6. All right, title and interest of Plaintiffs in the real property designated as 10 Poipu Place is terminated and Defendant Howard T. Lane is permitted to retain all sums paid under the Agreement of Sale between Defendant Howard T. Lane and Plaintiffs Leon D. Richardson and Margie J. Richardson dated June 30, 1981 and the Agreement of Sale is cancelled and any rights of Plaintiffs under the Agreement of Sale or assignments thereof are terminated.

7. Defendants Howard T. Lane and Willis Sinsabaugh are entitled to judgment against Plaintiff Leon D. Richardson in the sum of $1.00 each for Leon D. Richardson's defamatory and tortious conduct.

8. Defendants are given leave to move for taxation of costs and attorneys' fees against Plaintiffs.

DATED: Honolulu, Hawaii; January 23, 1985.

EDWIN Y. SASAKI (SEAL)
Judge of the above-entitled
Court

APPROVED AS TO FORM:

WESLEY W. ICHIDA
CATHY A. LEE
Attorneys for Defendant
Willis Sinsabaugh and
Waterfront Properties, Inc.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON, et al., *Plaintiffs-Appellants,*
CIVIL NO. 70332

vs.

HOWARD T. LANE, et al., *Defendants.*

TRANSCRIPT OF PROCEEDINGS

before the HONORABLE EDWIN Y. SASAKI, Assigned Judge, presiding, January 17-18, 1985. Motions.
APPEARANCES:

For the Plaintiffs	Gary V. Dubin, Esq.
For the Defendants Howard T. Lane	Michael W. Gibson, Esq.
Sinsabauch & Waterfront Properties	Wesley W. Ichida, Esq. Cathy A. Lee, Esq.

REPORTED BY:
Regis Taylor RPR, CSR 192
Certified Shorthand Reporter 192
Official Court Reporter
First Circuit Court
State of Hawaii

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21 All right? Now we will here Mr. Gibson's
22 motion.
23 MR. GIBSON: Thank you, Your Honor, my motion
24 deals with the problems which we have had concerning the
25 discovery of the plaintiffs experts.

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By way of background, Your Honor, in June of 1984 I first subpoenaed the — I don't know if that was the first time that I subpoenaed them, but I subpoenaed the plaintiffs experts to appear on June 22, 1984.

Mr. Dubin advised me that his witnesses would not be attending, and I filed a motion for leave to depose his experts on June 20, 1984. Mr. Dubin filed a memorandum in opposition to that motion, and ultimately in, I believe it was, September, there was a stipulation and order entered in this case requiring under certain conditions that plaintiffs would be required to produce their experts.

Nothing happened, so again I subpoenaed their witnesses on October 30, 1984 to appear at various different times beginning with around the day after Thanksgiving weekend, which is November 26th.

We have begun but not completed the deposition of Mr. Lipman. Mr. Lipman had various commitments — the first time we deposed him he hadn't completed his report.

In fact his report which is in that red booklet there is dated December 10, 1984. The first time we deposed him he hadn't even completed it.

The second time we deposed him we were unable to complete his deposition, we did have the completed report but Mr. Lipman had to go to the mainland for Christmas holidays.

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We were told he would come back and we could finish it. We began the depositon of Mr. Hidano.

Mr. Hidano, during his deposition, said, and Mr. Dubin confirmed that certain documents would be provided, just reading from one page, question to Mr. Hidano.

QUESTION: "Do you have those in your file somewhere at your office?

ANSWER: Yes, I do.

QUESTION: Could you please provide those to Mr. Dubin, who will provide them to us?

MR. DUBIN: I will send them to you. I well make them available."

Even as of this morning Mr. Dubin has told me that he doesn't have those documents.

At 3:00 o'clock on the day of Mr. Hidano's deposition the last thing that is in the record:

"Mr. Hidano, it is now 3:00 o'clock, I don't know if you have to leave now, but I am certainly far from finished. If you have to go, I guess we have to stop now and reschedule this.

MR. DUBIN: Well, good, let's do what I suggested. Lets take Lipman's deposition, then perhaps we will be able to do Mr. Hidano's."

We have not finished Mr. Hidano's. In this

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plaintiffs supplemental pre-trial statement filed at 8:29 this morning, in addition to those two witnesses who are listed under list of expert witnesses, although we subpoenaed Steven Mood and Evan Hayase, we have not yet taken their depositions, Your Honor, and this isn't because we have waited to the last minute to do this.

This is in spite of and in direct contradiction to the stipulation and order requiring them to make those witnesses available, and we said throughout, listen, we want to depose your witnesses, and we have been prevented from doing it.

We said we will go beyond the discovery cut-off to do it. I said I will make my experts available, and you make your experts available.

It would be unfair to let them bring these expert witnesses into court without letting us have the opportunity to depose them, and that is all we are asking for.

I suggest that either the Court not let these witnesses testify, strike whatever evidence they are suggesting they would introduce through them or, and I don't want to do this, but I think it is the only alternative, put the trial off for a specific amount of

time, a week, and let us finish these depositions.
But we cannot go to trail on Monday until we

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finish the depositions of their experts. This case involves alleged construction defects. These experts are their number one architect, who has prepared this report, which is the guts of this case, their cost estimator who is supposedly going to provide us with a breakdown of all of these costs of repairs that they say need to be done, and two other witnesses who I am not sure what they are going to say.

Your Honor, it just is a matter that we can not just pass over lightly and say we will proceed without having taken their testimony.

THE COURT: Mr. Ichida, anything that you would like to say?

MR. ICHIDA: Yes, I concur with Mr. Gibson's comments and wish to add the following. I don't have any experts in the same area as these experts here, construction, architects, and those matters. However, because of the potential joint and several liability that my client has with Mr. Gibson's client, I certainly have an interest in completing the depositions of these experts which we have not done yet.

THE COURT: Mr. Dubin?

MR. DUBIN: Your Honor, Mr. Gibson has presented this court with a fairytale. The true facts are that he — frankly this is the first case in 22 years of

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practice of law that I have been in that has over 50 or 60 depositions.

Plaintiffs have provided these before being requested to do so, and it is in the record of this action, all of the reports that we had when we got them.

A dispute arose several months ago because Mr. Gibson wasn't paying our experts and wasn't providing his reports. We then resolved this by a stipulation where we all agreed in good faith that we would let everybody take

everybody's expert deposition.

What happened? We took the deposition of plaintiffs expert, Steven Hidano. We took the deposition of Edward Ida. We took the deposition — these are all plaintiffs experts. Norman Lacayo. We took the deposition of Russell Smith, plaintiffs expert. James Tamara, a plaintiffs expert. Brian Gregg, a plaintiffs expert. Jack Lipman, I believe that there are two transcripts of the rest of his deposition.

This is what has happened in the last month and a half in this case. Helen Price, plaintiffs expert. Jerry Nakagawa, plaintiffs expert.

This represents Mr. Gibson's experts. He let us depose one of his experts. Mr. Vernon, he postponed. Then he told me about week ago in a Mr. Vernon wasn't going to come until he was done with all of our experts, and I

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told with Mr. Gibson that is not the way we are going to play the game. I want some of his experts.

Then when he finally changed his mind and said you can have Mr. Vernon, it is frankly, Your Honor, about a week before the trial.

Now, plaintiffs have 3 or 4 of their experts to take. In addition to that, Mr. Gibson is in violation of the Court's order concerning the turning over of expert documents.

He told me the other day he has his surveyor's report he hasn't made available to us. Plaintiffs counsel needs time to prepare for a meaningful trial in this action, and therefore the only thing that Mr. Gibson said which is correct is that I told him that within the week before the trial I needed time to prepare this case for trial, and as a result I would give up my right to take his experts and we would just proceed to trial.

We have absolutely no objection to his taking our experts. However, he has had, as the Court can visibly see, quite a few of our experts testimony and this hardly looks like a plaintiff that is trying to hide anything,

Your Honor.
If Mr. Gibson wishes to continue it, we would need an additional week to take the experts and we are not opposed to that, but plaintiffs counsel, Your Honor, this

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trial could go on for 6 weeks and the ability to prepare in advance for this trial means to us the possibility of limiting the testimony and the scope.
So Mr. Gibson's continual motions in the record of this action for a dismissal we feel that that would be grossly overreaching.
THE COURT: Mr. Dubin, did Mr. Gibson write to you on January 9th informing you that his experts would be available on the 14th and 15th of January, 1985?
MR. DUBIN: Yes, he did, Your Honor, and I think I got that letter this week, and I informed him that I needed a week to prepare the case for trial, and in addition to that Lipman had to attend something in Los Angeles and just got back. So I have to work with this schedule of my witnesses and Mr. Hidano is on the contractors board, and they have had something going on regarding the settlement of a dispute or something, so I do the very best I can.
THE COURT: Was the order, Judge Chun's order concerning the stipulation for the examination of the experts, complied with?
MR. DUBIN: Your Honor, that stipulation —
THE COURT: He has about 3 or 4 conditions in it.
MR. DUBIN: No, Mr. Gibson has not given us all

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of his reports, but that order of Judge Chun had nothing to do with the cut-off.
We had attempted to see Judge Chun about this the other day, and all we heard Judge Chun say was, well, if it is within the cut-off you have to file for a motion to enlarge time.
Now, the order does not specify that the 30 day

cut-off —

THE COURT: The conditions in that order does not pertain to cut-off.

MR. DUBIN: That is correct, Your Honor.

THE COURT: It pertains to the payment of the experts and what not.

MR. DUBIN: The only —

THE COURT: Have those conditions been complied with by Mr. Gibson?

MR. DUBIN: Your Honor, he has reports that he has not turned over and we have attempted informally to adjust to everybody's schedule including Mr. Gibson's and the experts — and I would not exactly fault Mr. Gibson, except he did tell me last week he was withholding his experts until he finished ours, which I think was unfair, but he withdrew that.

But he does have some of the reports and he has not given them to us. To that extent he has not complied

with the stipulation.

THE COURT: The Court is going to take a short recess.

(Recess.)

THE COURT: Mr. Gibson, the Court has some questions, pertaining to the order of Judge Chun. It says each party must first pay all past deposition fees of all experts.

Did you pay that?

MR. GIBSON: Your Honor, we have paid all, with the exception of Mr. Lacayo. I submitted a memorandum to the Court on that matter, and Mr. Dubin, as far as I know, has not submitted any memorandum with respect to that.

There is a dispute as to whether that had to be paid, and the Court suggested that we submit memorandum on that, that is what I did.

THE COURT: All right. Number two, it says each party must first turn over all written reports of each of its experts to all counsel and all such furtther written

request received as a continuing condition for being permitted leave to take further oral depositions of experts in this action.

MR. GIBSON: What Mr. Dubin is referring to is a survey done by Gordon Mata, Associates with respect to the sewer easement. It is true that I have not given him

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that, and I do not have that yet from my expert, but I am told that I will be getting it, and I haven't provided it because I don't have it yet, but I am told that it exists.

THE COURT: All right. Each party must bear the reasonable attendance and preparation fee of all further experts proposed by each within 30 days of the deposition.

MR. GIBSON: With respect to that, Your Honor, every bill submitted to me I have paid forthwith. As far as I know the bills that I have submitted to Mr. Dubin have not been paid yet.

THE COURT: It says further, expert depositions are to be held at the convenience and agreeable to all parties in advance of notice thereof.

Mr. Dubin, which one of these conditions do you say Mr. Gibson —

MR. DUBIN: Two days ago he told me that he had the Mata report. That is the one. Also the —

THE COURT: His request for deposing your client or the expert was more than two days ago, isnt' that correct?

MR. GIBSON: I think, Your Honor, I got that on Monday, and our position openly on that was that this order did not stay the 30 day cut-off period. We had just agreed —

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THE COURT: I agree with you, the order gave you leave to take depositions up to the time of trial.

MR. DUBIN: I don't think it says —

THE COURT: It says, experts depositions are to be held at a time convenient and agreeable to all of the

parties in advance of the noticing thereof.
There is no cut-off date. I agree with you
THE COURT: That was never interpreted by us, Your Honor, to waive the cut-off date. It only came — what happened was — that was months before we got to the 30 day cut-off date.
MR. GIBSON: Your Honor, all of my subpoenas to all of his experts were out before the cut-off date. When they would appear, if it were to be some date other than the date on which they were required to be there pursuant to the subpoena, was a matter agreed upon between Mr. Dubin and I, for his convenience and my convenience and the witness' convenience.
THE COURT: And you felt experts that received Mr. Gibson's subpoenas appeared for their depositions?
MR. GIBSON: That is not true, Your Honor, we have not seen Mr. Hayasi and Mr. Moon.
MR. DUBIN: Well, you know that they were out of town at that time.
THE COURT: Just a moment. If you want to

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argue among yourselves, you go out in the corridor and argue.
MR. DUBIN: All right. Your Honor, what it boils down to is that we tried to reach agreement on all of the depositions. I was allowed the take one of his experts, he had all of my experts come.
He wanted more and more of their time and it got down to the last week before the trial, and I told him, Your Honor, that I needed some time to prepare the case for trial and I had waited an awfully long time.
Our objection is not that Mr. Gibson should not be permitted to take more deposition, but counsel has to have some time to prepare the case for trial.
He waited until the very end and we were supposed to do it the week before when he imposed the condition that he was to go first and by the time he withdrew that, it was earlier this week, so —

MR. GIBSON: Your Honor, I really feel I have to respond to that. If the Court doesn't have it, as I told the Court earlier, I filed a motion for leave to depose these experts and attached — that motion was filed June 20, 1984.

Attached to that motion is my affidavit, together with correspondence, which shows that it goes back as far as March 1984, when I first began trying to schedule

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these depositions.

In my affidavit I point out that I had tried to schedule them. We couldn't reach an agreement. First he said yes, then he said no. So I finally gave up and filed a motion. That is when we got this stipulation and order so it is not a matter of waiting until the last minute.

MR. DUBIN: The history is already documented and I have answered that. That is why Judge Chun did not grant his motion for sanctions beore. He has withheld his experts from us, but I see no benefit in arguing the past.

The issue here is that they have taken — this, to me, represents — he has more experts he refused to supply us with, saying that we were to go first, when that was not in the order, but then he withdrew that, and when I had notice that he was all set to go again, and we were preparing for trial and have clients coming in from Hong Kong, and I have to prepare them.

It is as simple as that, and didn't mean that to be in violation of any court order. We went on for months of these depositions. It didn't say that Mr. Gibson had the right to take Mr. Lipman's deposition for an entire week.

We provided him with the information and details of every condition. His experts made no inspection.

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They broke into no walls. They just looked for a couple of hours visibly, and frankly their expert testimony is really less than useful. Ours is the only

experts that actually did the type of examination necessary, and we have shared all of that information with Mr. Gibson, I don't know what more we can do.

If he wants to take more depositions, it would be all right for us to let him take some more depositions next week.

THE COURT: That is too late right now. Mr. Dubin, Mr. Gibson, when the court says the deposition is permitted to be taken, that means the deposition is permitted to be taken until the deposition is completed.

The court believes from hearing both counsel argue and reviewing the records that you have failed to comply with the order of the court. Therefore, the sanction that the Court is going to impose in this case is that the Court is going to prohibit you from permitting Mr. Lipman — or is going to prohibit Mr. Lipman, Mr. Hidano and Mr. Peralski from testifying in this trial.

MR. DUBIN: Your Honor, let me hear say this, those are our major experts. Without them, we cannot go to to trial.

THE COURT: It is up to you how you proceed. The Court is prohibiting them from testifying.

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Court is adjourned.

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Wednesday, January 18, 1985, 8:35 A.M., Honolulu, Hawaii.

THE CLERK: Civil 70332, Leon D. Richardson, et al versus Howard T. Lane, et al, Motion to Dismiss.

MR. GIBSON: Good morning, Your Honor. Your Honor, Loren Hirano and Michael Gibson for defendant Howard Lane.

MS. LEE: Cathy Lee on behalf of Waterfront Properties and Sinsabauch.

THE COURT: The record will note that it is now 8:35. Mr. Gibson, did you serve notice upon all of the parties concerning this hearing this morning?

MR. GIBSON: Yes, I did. Your Honor, and if

Your Honor will recall, we also reminded all of the parties at the pre-trial conference yesterday morning held at 8:30 in your chambers, that this motion was to be heard this morning.

I know Mr. Dubin is aware of the motion this morning.

THE COURT: All right. Mr. Dubin is not here. Mr. Gibson, this order was just entered not to long ago.

MR. GIBSON: Yes, Your Honor, a brief background, and I would like to submit those documents into the record.

This motion was argued on September 19th. So

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the plaintiffs had knowledge that there was a possibility this order might be entered on that date, September 19th. On — here is Mr. Dubin, Your Honor.

MR. DUBIN: I am sorry to be late, Your Honor.

THE COURT: All right, Mr. Dubin.

MR. GIBSON: On December 5th I received a telephone call from Randal of Judge Chun's courtroom, and the note says "re: Richardson vs. lane, motion for order to deposit payments into court was granted, we are to prepare the order."

On December 7th — well, going back, on December 6th I attempted to give to Mr. Dubin a copy of that order during a deposition. He indicated that he did not want me to hand it to him at that time.

So I mailed it to him on the 7th of December. On the 10th of December Mr. Dubin wrote a letter to me with a copy to this Court indicating that he had received the draft of the order on December 7th.

On December 12th Mr. Dubin wrote a letter to Philip Chun saying that he had attepted to discuss the matter of the payments, the order, into court and basically that we had not reached an agreement and he did not agree with my proposed order.

On December 12th I wrote a letter to Mr. Dubin with a copy to the Judge saying I suggested that Mr. Dubin

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either submit his objections to my proposed order or submit his own proposed order as provided in the rules.

On the 13th I wrote a letter to the Judge saying that I did not agree with Mr. Dubin's objections, that if the Court was so inclined, I was willing to submit another order saying exactly what the amount was, and setting a deadline that the amount should be paid into court before the commencement of this trial.

That ws my letter of December 13th. On December 18th Mr. Dubin indicated to the Court that he was still trying to meet with me to discuss the terms.

So as to avoid any appearance of impropriety, I agreed to meet with Mr. Dubin. On the 24th of January, and he sets forth that —

THE COURT: The 24th of January?

MR. GIBSON: Excuse me, the 24th of December, the day before Christmas. Mr. Dubin wrote a letter to the Court saying we have agreed to meet on Monday, December 24th, "and I will return to Your Honor on whether and to what extent we agree on the proper wording of the order."

On December 26th, one day after Christmas, Mr. Dubin wrote a voluminous letter to the Court indicating that we had had our meeting, and that we had not reached an agreement.

The reason we had not reached an agreement was

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I asked Mr. Dubin, forget about what conditions we are talking about, is your client going to or not going to put the amount of money into court.

He said we cannot agree on what that amount is. I said, if we cannot agree on that, as far as I am concerned I will submit my order.

We did that, so on January 14th the Court signed the order. I submit to the Court that Mr. Dubin's clients have had a long time to look at this. They say they are uanble to do it because of the situation of Deak Perrera in Hong Kong.

Your Honor, we have a personal financial statement signed by Mr. and Mrs. Richardson wherein they indicate as follows, and this was at the time of the closing.

"We have in the name of Leon Richardson and Margie Richardson certificates of deposit in Bank of America Hong Kong in excess of one million US; Bank of America branch San Francisco CD's in excess of 350,000: Bank of Canton-Hong Kong, certificate of deposit in excess of 100,000; Bank of Montreal, in excess of 20,000; the Banco National de Mexico, equivalent — in excess of one million dollars; Swiss Bank Corporation Lucerne, certificate of deposit in excess of one-half million; gold assets 425 Krugerands in deposit in vault of Swiss bank and

50 Krugerands in deposit in vault of Deak Perrera Hong Kong. We have 50,000 Hong Kong in an interest bearing account in American Express Bank in Hong Kong; miscellaneous deposits in New Sourth Wales, Drummond, Australia; Bank of Montreal; Bank of Canton; Bank of America."

Your Honor, this is not a question of they are unable to put up the money because they don't have the funds, and because of this situation at Deak Perrera.

If what they say is true, they have money all over the world. If what they say isn't true, the situation is this: we have a citizen of the United States, resident of Hawaii, who has got a lawsuit going against people who used to be citizens of the United States who moved out of this country, give up their citizenship for tax reasons, moved to Hong Kong, have no assets in the United States or so they say, at least no assets in Hawaii, and we don't have any ability to collect on a judgment, if we should succeed in our trial.

That is why this order is appropriate, and that is why this Court should impose the sanctions which I have asked for, and I would like to make these various correspondence a part of the record, and I will submit them

at this time.
THE COURT: Has Mr. Dubin looked at them?

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MR. DUBIN: Your Honor, I have no way of knowing unless I consult my files whether these contain all of the letters, and I object to a personal financial statement four years ago being considered as evidence by this court in the resolution of in matter today, when we don't even have an evidentiary hearing, and Mr. Gibson has done the same thing he did yesterday, provided on record statements of fact that are absolutely false, and it makes it difficult for counsel to counter such statements without the opportunity for an evidentiary hearing.
If Your Honor wishes to pursue this, I would ask or request an evidentiary hearing.
THE COURT: The documents will be received by the Court. Mr. Dubin?
MR. GIBSON: May I point out one other thing, Your Honor?
THE COURT: Yes.
MR. GIBSON: Mr. Hirano checked this morning and the funds are — not one single cent is on deposit, so this isn't a question of a good faith effort to put up some money. There is no money on deposit.
THE COURT: Before we get to you, Mr. Dubin, Miss Lee, are you going to say anything.
MS. LEE: No, Your Honor.
THE COURT: Mr. Dubin?

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MR. DUBIN: Your Honor, if the Court wil bear with me, today I intend to make a full record of this matter, and a transcript of this proceeding.
My office received an order for the first time signed by Judge Chun on January the 17, 1985 that bears a printed meter postmark of January 15, 1985.
Mr. Gibson filed this motion to dismiss the day before I even received the order of this Court. I have had approximately less than 24 hours to examine these papers

for a motion to dismiss a case that my clients have spent several hundred thousand dollars in legal feast, $40,000 or more dollars in expert cost, and have litigated this for three years.

Mr. Gibson forgot to tell you that his client is in bankruptcy. My client, Your Honor, has relied upong the order of Judge Sodetani issued two years ago in this court that specified that no payments would have to be placed into this Court.

My clients are entering their 70's, and despite Mr. Gibson's statement of his knowledge about their arranging their matters for tax purposes, my clients have done their estate planning like everyone else who enters into their 70's and their financial statement is considerably different than what Mr. Gibson might present to this Court today.

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When this decision was made, Your Honor, it was made after a confusion where Mr. Gibson filed this and went to one Judge and another Judge, and then when J Chun's clerk indicated that the Court had approved this, I then raised with the Court a number of specific issues, and by the way I have been informed that the Court may have lost the file and I do not know if Judge Chun has even read the letters which have been submitted now to this Court.

I understand Mr. Gibson — they couldn't even find the order, and he had to go and submit another order. My information is that the order that Mr. Gibson submitted that was signed was different than the order submitted pursuant to the Circuit Court rules, and therefore is a violation of the circuit court rules.

I pointed out for the record to Judge Chun that first, no specifics amount is specified and this creates a problem because my client has funds in Australia and you have to apply the Bank of Canberra to replace funds, and it takes about 90 days, and you have to specity the amount.

Now, the order says that all funds — it says deposit all payments due under the agreement of sale. Our

position is, Your Honor, that there are no payments due under the agreement of sale and because the right to trial by jury exists in this state until a court determines by summary judgment or otherwise that there are payments which

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are due.

My client's position is that he has no obligation barring a decision by a jury that conditions precedent have been met for his payments.

But my first problem is that there is no statement in the order as to what is to be due. Indeed, the amount is in dispute as to the nature of the obligation because the agent for Mr. Lane in his deposition under oath specified that there was an agreement for a 12 and a half percent discount. So we need to know the exact order.

My second point to the court court was that my client will not deposit funds unless an interest rate commensurate with such deposit is specified in the order. This seems like a simple request to make. Even that, Mr. Gibson was not agreeable to, because assuming this amount is in the nature of one million dollars —

THE COURT: Did you make the request at the hearing?

MR. DUBIN: Your Honor, I made several requests at the hearing?

THE COURT: Did you make that request at the hearing?

MR. DUBIN: I would assume that I did, Your Honor.

THE COURT: I don't want assumptions, did you

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or didn't you?

MR. DUBIN: I would have to say that I did. I made a number of requests at the hearing.

Not only that, but this order has just been filed and it is the intention of the plaintiffs to bring, and it is our appropriate right to do, to bring a petition for rehearing before Judge Chun on these very matters.

Also the draft does not provide a reasonable time for deposit of such funds. My clients have explained that it would take 90 days to get money transferred because of restrictions in the Austrialian government for the transfer of such large funds outside of Australia.

THE COURT: Did you know that at the time of the hearing?

MR. DUBIN: I did not know that at the time of the hearing, Your Honor.

THE COURT: When did you find this out?

MR. DUBIN: I found that out when the order came down, and I wrote Judge Chun, I think it is in my letter of the 12th. If it isn't, it is in one of the subsequent letters. I found this out from my clients subsequently.

THE COURT: All right.

MR. DUBIN: And that would be one of the basis for a reconsideration. We frankly don't think 90 days is —

you see, we had Judge Sodetani who said the money didn't have to be put in the court, which we think was the law of the case, and then suddenly this order came down as a suprise to us, and we are perfectly happy to to take up on appeal whether a million dollars has to be deposited in this court on one days notice after the order is signed.

My clients are prepared to submit to examiniation by this court that they are making — that they would make reasonable efforts to provide this money, but the notion of forthwith is not clear, and our position is, Your Honor, that when a matter of enforcement of an order of this court is made, it should be brought back to the Judge who created the order, and " forthwith" has many interpretations and we think 90 days under these conditions is forthwith.

The next point I made is that if parties are supposed to submit disputed payments into court, then the equal protection of the law is required that all parties submit such payment, and that would be a matter also to go

before Judge Chun.
THE COURT: That motion was never raised to the Court.
MR. DUBIN: That is correct, Your Honor, that motion was never raised.
THE COURT: so that issue was never before

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court.
MR. DUBIN: The next point is that the Court's order is required to state findings of fact, and no findings have been provided in the draft of the order.
My understanding of federal constitutional law is that a state attachment process can not issue unless there is a finding of fact concerning the likelihood of success, and no such finding of fact has been made.
In fact, there was no evidentiary hearing. Now, I can not understand otherwise than this order is an attachment order for the very fact that the only statute cited by Mr. Gibson was that for estate holder, which is not applicable.
I have seen no authority for this order whatsoever. This is an order to provide security and both state law and federal law of a constitutional foundation decided by the United States Supreme Court in the last decade require findings of fact, and we are going to ask Judge Chun for an evidentiary hearing upon a reconsideration.
Also, we are going to ask Judge Chun that it would be appropriate and the attachment statutes of this state so provide for the posting of a bond. When one party is asked to put a million dollars into court, we would like some protection before putting the money in, so if this

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turns out to be a frivolous demand that we have appropriate protections, and we think the law on that is clear.
Also we pointed out this could be taken care of at some other time, and that this information should be kept from the jury that such deposit was made.

THE COURT: Mr. Dubin, why didn't you ask Judge Chun at the earlier hearing if you wanted to post a bond instead of cash?

MR. DUBIN: We are talking aobut a bond for the other side, Your Honor, our position —

THE COURT: Why didn't you ever raise the issue before Judge Chun?

MR. DUBIN: We raised a number of issues.

THE COURT: I get the impression this is the first time these issues have been raised.

MR. DUBIN: Your Honor, I can tell you it is in my motion papers. I raised the attachment issue and bond issue in my motion papers.

The matter was brought before the court before, when it was denied by Judge Sodetani. The Court will find in my brief two years ago, and also in the information I submitted to Judge Chun which incorporated in that brief the points that I am making today.

Now, I invite the Court to look at the record. Now, Mr. Gibson has made a number of evidentia.y statements here which are factually incorrect. Page 40

If the Court is going to rely upon his factual statements, then I would suggest to the court an evidentiary hearing is necessary.

All can I tell the Court is that I received this order yesterday before this motion to dismiss was filed, and that my clients would need a opportunity to apppropriately respond.

We intend to go and apply for a rehearing with Judge Chun to see if we can't make the order more specific and fair.

We are going to ask for 90 days to make this deposit, and I think that a motion to dismiss this case based upon this motion being filed the day before I have even received a copy of the order is grossly unfair.

If Mr. Gibson wishes to bring a motion in order to force the enforcement of this, that is fine, but to ask for a dismissal when I just received it, I feel is a —

would be a gross violation of my clients constitutional rights.

THE COURT: If your client had made payments to Mr. Gibson's clients according to the schedule, how much more would your clients have had to pay Mr. Gibson's client, under the agreement of sale?

MR. DUBIN: Our position is, Your Honor, that

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our clients have no obligation to make any payment under the agreement of sale because their performance has been excused because of fraud and breach of contract, of which we have evidence to present to the jury.

THE COURT: My question is if they had continued to make the payments.

MR. DUBIN: In January of 1982 there was an agreement to discount an $850,000 obligation by 12 and a half percent. So it would be $850,000 discounted by 12 and a half percent.

MR. GIBSON: The answer to your question is $966,133.80. It represents a payment of$850,000, which was due on January 13, 1983 under the terms of the agreement of sale, and monthly installments of $11,613 for a 10 month period from February 1982 until December 1982.

These are the payments which were required under the agreement of sale which were not made. The agreement of sale is very specific. My motion is very specific on this, there is no question as to what was due and unpaid.

This issue of the discount, this issue of the offsets all could have been or were raised in the motion with Judge Chun, Your Honor.

THE COURT: Mr. Dubin, so if you talk about a 12 percent discount you are talking about a discount of

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$102,000; is that correct?

MR. DUBIN: I would accept the Judge's math.

THE COURT: You had better not accept it.

MR. DUBIN: I don't have my calculator here.

It would be $850,000 minus 12 and a half percent.
THE COURT: All right.
MR. DUBIN: In addition to that there is a foreclosure on the property itself which is proceeding and that foreclosure would reduce that amount, Your Honor, that Your Honor is figuring out, by about $400,000 because the bank is going after the security and therefore the monies would not be due under the agreement of sale. So I suggest to Your Honor —
THE COURT: 12 and a half percent of $850,000 would be $106,250.
MR. DUBIN: Then, Your Honor, minus approximately $450,000 for a bank which is foreclosing. My client can't be expected to put up money when the bank is going after the security. That would be the placing of a double security.
THE COURT: Anything else?
MR. DUBIN: Well, the bank has decided to go after the property as a security. This includes the amount that was to be paid by the bank, and the bank has elected to go after the security in foreclosure.

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So our position is that the amount would have to be further reduced by the amount owing to the bank, otherwise there would be a double payment.
THE COURT: Well, if your client pays to the bank.
MR. DUBIN: But the bank has elected to go after the security and they are selling the property.
THE COURT: Anything else?
MR. DUBIN: No, Your Honor.
THE COURT: Mr. Gibson?
MR. GIBSON: Just very briefly, Your Honor, with respect to the issue of whether or not this is the same order which was submitted, Your Honor, it is the same order that was submitted.
THE COURT: the record will speak for itself.
MR. GIBSON: I think I pointed out what the

figures are, with respect to Mr. Dubin's argument just now, all of these arguments which he has made this morning either were or could have been made at the time of the motion before Judge Chun.

THE COURT: All right.

MR. DUBIN: Your Honor, it is not ususual to ask a court for reconsideration based upon certain facts, and sometimes those matters are given. It is provided for in the rules, and my clients feels that he should have the

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opportunity to do so.

THE COURT: All right. Miss Lee, anything else that you would like to add?

MISS LEE: No, Your Honor.

THE COURT: Or Mr. Ichida, since you are here?

MR. ICHIDA: No, Your Honor, thank you.

THE COURT: Apparently, there is some dispute as to the amount that you are talking about to be deposited with the Court and in order to resolve that difference what the court is going to do is I am going to take Mr. Dubin's word that $850,000 was the amount we are talking about, discount that by 12 and a half percent, which leaves a balance of $734,750, and I am going to amend the order, Judge Chun's previous order, to say that $743,750 shall shall deposited with the Court by 8:30 — excuse me, we go to trial at 9:30. By 9:30 Monday morning. That is this coming —

MR. DUBIN: Your Honor, if I can speed things along, I can tell you that the money cannot be deposited by that time, and our position it that that would be a grossly unfair burden upon the plaintiffs, and can tell the Court frankly that this money cannot be deposited and I wish the Court to understand that that this is not a case where my clients can even take the property and use that as collateral because of damage that was caused by defendant

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Lane.

This puts my clients in a very hardship

situation, and I can tell you that there is no way that that money can be gotten from Australia because of the Deak Perrera, and I assume Mr. Gibson — we provided you — also has the information on Deak Perrera's bankruptcy —

THE COURT: What can your clients post with the Court?

MR. DUBIN: I would have to talk with them, Your Honor.

THE COURT: All right. What the Court will do is say security or cash in the amount of$743,750.

MR. GIBSON: If that is not posted by 9:30 A.M. on Monday, Your Honor, what is the ruling of this Court?

THE COURT: We will cross that bridge when we come to it.

MR. DUBIN: Your Honor, I can tell you that it cannot be posted. I have talked to my client. They are in their 70's.

They have done their estate planning, and the cash they have is in Australia and they have already checked and found out the regulations of the Canberra Bank, and it is impossible to do that, there are other liquid funds which are gold and it is tied up in Deak Perrera's bankruptcy in the United States, but the money is in Hong

Kong, and it is tied up there, and there is a receiver there, and that money is under the control of the receiver.

MR. GIBSON: Your Honor, this —

THE COURT: The Court is going to order that the $743,750 or security of that value be posted with the Court by 9:30 Monday morning.

MR. DUBIN: 9:30 Monday?

THE COURT: Yes, that is the day of the trial.

MR. GIBSON: It is the 21st, Your Honor, January 21st.

THE COURT: All right. Anything else?

MR. GIBSON: Your Honor, lthis is not a matter which pertains to this motion, but we do have the order with respect to yesterday's motion. We were not able to

get it to Mr. Dubin.

I am handing it to him no. All other counsel have approved it as to form.

THE COURT: All right.

STATE OF HAWAII
CITY AND COUNTY OF HONOLULU

I, REGIS TAYLOR, Certified Shorthand Reporter 192, an Official Court Reporter for the First Circuit Court, State of Hawaii, hereby certify that the foregoing comprises a full, true and correct transcription of my stenographic notes taken in the above-entitled cause.

Dated this 1st day of January, 1985.

OFFICIAL COURT REPORTER
REGIS TAYLOR, RPR, CSR 192

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON, et al., *Plaintiffs,*
vs.
HOWARD T. LANE, et al., *Defendants.*

CIVIL NO. 70332

TRANSCRIPT OF PROCEEDINGS

had before the HONORABLE EDWIN Y. SASAKI, Assigned Judge, presiding, on Monday, January 21, 1985, in the above-entitled matter; MOTIONS IN LIMINE.

APPEARANCES:

GARY V. DUBIN, ESQ. — For the Plaintiffs
Attorney at law

MICHAEL W. GIBSON, ESQ. — For Defendant Howard Lane
LORRIN HIRANO, ESQ.
Attorneys at law

WESLEY ICHIDA, ESQ. — For Defendants Sinsabaugh
CATHY LEE, ESQ. and Waterfront Properties
Attorneys at law

REPORTED BY:
Jonell M. Kaku, C.S.R. No. 138
Official Court Reporter
First Circuit Court
State of Hawaii

MONDAY, JANUARY 21, 1985 8:40 A.M.

(the clerk called the case.)

MR. GIBSON: Good morning, your Honor. Michael Gibson and Lauren Hirano who are present in court today with Defendant Howard Lane and cross-claimant Willis Sinsabaugh. We're ready to proceed this morning.

MR. ICHIDA: Wes Ichida and Cathy Lee, together with Defendant Willis Sinsabaugh, individually, and as a representative of Waterfront Properties, defendants. We are also ready to proceed, your Honor.

MR. DUBIN: Good morning, your Honor. Gary Victor Dubin representing the plaintiffs in this case. Plaintiffs object to any further proceedings in this action at this time.

THE COURT: What's the basis of your objection?

MR. DUBIN: The filing of disqualification by Leon D. Richardson, disqualifying the The Honorable Edwin Y. Sasaki, pursuant to Section 601-7(b) of the Hawaii Revised Statutes filed this morning, January 21st, at 8:24 a.m.

THE COURT: Mr. Gibson, did you receive a copy of that affidavit?

MR. GIBSON: Your Honor, it was filed at 8:24 this morning, and I have received a copy of it. I briefly

reviewed it. To be quite honest, apparently, what the affidavit seems to say is that they don't want your Honor to try this case.

THE COURT: Mr. Ichida?

MR. ICHIDA: I just received it, your Honor. I haven't even read it.

THE COURT: Mr. Dubin, the Court has received a copy of your affidavit. However, being that your affidavit is not in the form of a motion, the Court will not consider it this morning. All right?

Mr. Gibson, you want to proceed with your

motion, please, first motion.
MR. DUBIN: Your Honor, may I point out to the Court that Section 601-7(b) requires a mere filing of the affidavit, says the judge is thereby disqualified from proceeding. Does not provide for a motion.
THE COURT: I will not disqualify myself. All right?

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MR. DUBIN: Your Honor, may I make a statement on the record, again, your Honor, that it is impossible for plaintiffs to proceed with their case because of the ruling of this Court concerning sanctions.
Although it is not yet 9:30, I can tell your Honor that my clients have not deposited $743,750, 9:30 this morning, with the clerk of the court, and my clients have instructed me not to participate in this trial because they feel this is a denial of their right to a jury trial and the right to a trial judge who has not been a party to this action and has made decisions which bring in knowledge which will be relevant to other issues in this matter which will come in at a time in the trial and will represent information secured outside the trial that would disqualify a juror if the juror had such knowledge. That's our

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understanding of the law and that's our position.
And if your Honor wishes, I will prepare a motion for disqualification.
THE COURT: Mr. Dubin, the Court is not trying any of the facts of this case. The facts were to be tried by the jury. In fact, if you will recall, in our pre-trial conference, special instructions were to be given to the jury on the facts, and based upon the finding of facts by the jury, then, the Court would make the proper decision. Therefore, the Court was not at all to try any of the facts in this particular case. So I think you are in error on that matter because it was agreed that special verdict forms would be given to the jury to determine the facts of the case.

MR. DUBIN: I believe, your Honor, that the materiality of the breach is a question for the judge and not for the jury. And we feel that would relate to the question as to whether a deposit in court would be necessary prior to the trial.

Also, there is the issue of specific performance of the contract which my clients assert which I believe is an issue for the trier of fact. I've had many discussions with Mr. Gibson about this, and we've agreed that there are questions here, there are questions that are non-jury questions for the trial judge. Mr. Gibson had so

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advised me.

THE COURT: Mr. Gibson?

MR. GIBSON: I agree with Mr. Dubin. This is exactly what your Honor correctly stated previous to Mr. Dubin's statement that we were going to talk about that at the pre-trial conference. We did talk about it at the pre-trial conference, and the agreement was as your Honor has just described so I have nothing further to add to it.

THE COURT: Mr. Ichida?

MR. ICHIDA: I have nothing further to add too. I agree with the Court's recollection.

THE COURT: Court will take a recess.

(Recess had.)

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THE COURT: Counsel, will you have your name for the record.

MR. GIBSON: Michael Gibson and Lorrin Hirano for Defendant Howard Lane and cross-defendants or cross-claimants Howard Lane and Willis Sinsabaugh.

MR. ICHIDA: Wes Ichida and Cathy Lee for Defendants Willis Sinsabaugh and Waterfront Properties, Inc.

MR. DUBIN: Gary Victor Dubin reprensenting all plaintiffs, Leon D. Richardson, Margie J. Richardson and Copthorne N.V., appearing consistent with the objections previously made.

THE COURT: All right. Madame Clerk, could you draw 12 names, please.

MR. DUBIN: Your Honor, could we have a bench conference?

THE COURT: All right.

(The following bench conference was held:)

MR. DUBIN: Your Honor, my clients will not waive their trial by jury but have instructed me not to participate in this proceeding because we believe they're being deprived their constitutional right to trial by jury and to a trial judge who is impartial, based upon the memoranda which have been filed in this court today.

On that basis, my clients have instructed me

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not to participate, and we shall be taking an appeal from this proceeding. Again, I would ask the Court to permit us an interlocutory appeal.

THE COURT: All right. One thing at a time. All right, first of all, impartial judge. In what way am I impartial? I'm not impartial.

MR. DUBIN: There are —

THE COURT: Your affidavit doesn't specify.

MR. DUBIN: It's not my affidavit, your Honor. It's my client's affidavit, according to the statute, and it is on the basis that some of the issues in this case are to be determined by the trial judge such as recision, materiality of the breach such as specific performance of the contract, and we should have a trial judge who has not made substantive determinations in the case which are equivilent to the types of decisions that will probably have to be made at the trial.

THE COURT: All right. Mr. Dubin, at the pre-trial conference this past Friday, it was agreed that all facts would be tried by the jury and a special verdict would be entered —

MR. DUBIN: Still, your Honor —

THE COURT: — according to the finding of facts. And only after that would the Court make its

decision after the jury made its finding of fact. The

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judge would then apply the law to those facts.

MR. DUBIN: Your Honor, that is not our understanding of the law because the issue, for example, in —

THE COURT: That's what we agreed to in the pre-trial conference, Mr. Dubin.

MR. DUBIN: I believe we agreed that there would be a special verdict as to facts relative to the recision issue. However, there are decisions that the trial judge must make as to recision concerning the materiality of the breach, for example, which is a question of law

There are other issues in this case concerning specific performance of the agreement of sale which would be questions which we believe would be decided by the trial judge and not by a special verdict of the jury. We believe that would also be the case on the issue of defamation. We believe that that would also be the case on the issue of the statutory causes of action concerning fraudulent trade practices.

I can re present to this Court that I've talked over this subject with Mr. Gibson, and we have agreed from day one, which was when I came into this case two years ago, that there are some issues here that are within the province of the trial judge, and there are some issues that

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are of a jury nature, notwithstanding your Honor's correct memory of our discussion concerning special verdicts as to finding of recision.

We feel it is most unfortunate that these two motions to dismiss were presented to your Honor, and we feel that this is a structural bias that your Honor has unfortunately been placed in this position, and my clients do not feel that they would have a fair, impartial trial. This Court should take into account, in addition to the niceties of the legal issues here, I believe, the feelings

of my clients, a desiring to have an impartial trial judge.

THE COURT: Mr. Gibson?

MR. GIBSON: Your Honor, whatever Mr. Dubin and I may have agreed on before the pre-trial conference I think is first of all, I'm not sure that he's correct in what he says, what he discussed. But the point of the issue here is that it was agreed by all the parties and this Court that all issues of fact would be decided by the jury.

I would further point out that this motion was filed at 8:24 this morning with the jury trial to have commenced at 9:30, and whether there is merit or lack of merit to that affidavit, I would suggest to the Court that it was untimely as well as unfounded.

THE COURT: Mr. Ichida?

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MR. ICHIDA: Yes, your Honor. I think in response to Mr. Dubin's arguments, for one, the Court's decision with respect to the use of the experts is merely an evidentiary ruling. It is not a substantive ruling and therefore, does not reflect any biases of the Court one way or another.

I think it's incumbent upon the plaintiffs at this time to go forward with their case with or without those experts. Much of the case is still totally intact, especially the case vis-a-vis Defendants Sinsabaugh and Waterfront Properties, Inc. where he still has his expert. He still has a claim for recision. He still has his claim for general damages.

If the plaintiff does not go forward, we will take the position that his claims against Sinsabaugh and Waterfront Properties must be dismissed on the merits.

MR. DUBIN: Concerning the issue of timeliness, your Honor, this matter just came —

THE COURT: Just a moment. Mr. Dubin, the Court's going to not disqualify itself, all right? I'm not going to disqulify myself because I do not believe that the Court is impartial — The Court is impartial, rather,

to this whole matter because all issues of fact are to be tried by the jury, and the Court won't try any issues of fact.

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The second request as far as interlocutory appeal is concerned, Mr. Dubin, the orders have not been approved by you. According to the rules, you have a right to submit the oral order in five days. Therefore, the Court cannot take that right away from you. Therefore, the Court has not signed the order. Therefore, your request or your motion to shorten time and your motion for interlocutory appeal is improper.

MR. DUBIN: Your Honor, Rule 23 of the Circuit Court Rules specifies that upon being served with the order drafted by the prevailing party, the other party, which would be the party I represent, has five days within which to submit either objections or an order, according to the language of Rule 23.

Your Honor, my clients, parties-plaintiffs in this action, have submitted to this Court their objections, and I filed those objections this morning. There is nothing further to be done. We waive all time requirements. We will not change our mind. It is, we consider, urgent because of the fact that this trail is now scheduled to proceed, and we would appreciate a ruling.

THE COURT: All right. The matter of interlocutory appeal is not before the Court yet at this time. Therefore, the Court won't even consider it. All right? It's just an oral motion that you're making right

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now.

MR. DUBIN: It has been presented. Your Honor has our objections.

THE COURT: The Court has not signed your request to shorten time. The Court has not approved your request to shorten time for hearing the motion.

Anything else?

MR. DUBIN: The deposit has not been made at

9:30 as your Honor —
THE COURT: Right, but the Court hasn't signed that order yet so there's nothing to enforce at this time.
MR. DUBIN: The Court has made the ruling.
THE COURT: But the Court has not signed the order.
MR. DUBIN: The Court has made the ruling. Does the Court wish to reconsider its ruling?
MR. GIBSON: I would also like to point out on the record when I specifically asked what sanctions the Court would impose if the money was not put up, the Court said that matter would be decided if and when the money was not put up, and that matter is not before the Court at this time.
THE COURT: Very well. The order hasn't been signed yet because he's objecting to the order, all right? Anything else, Mr. Dubin?

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MR. DUBIN: Your Honor, we have been told by your Honor that we would not be permitted to introduce three of our experts at the trial of this action. We are here today, and your Honor has not signed the order but your Honor has not withdrawn the ruling. We object to the impaneling of this jury under the circumstances because we believe that it violates the substance of my clients' right to trial by jury.
THE COURT: All right. Your objection is noted. We'll proceed with the trial.
MR. DUBIN: On that basis, I will say that we do not waive our right to trial by jury.
THE COURT: The jury panel is sitting right there.
MR. DUBIN: I'm instructed not to participate in these proceedings.
THE COURT: The panel is sitting right there, Mr. Dubin, and what you have been instructed to do, I don't know. We will proceed with calling of the 12.
MR. DUBIN: I'm telling the Court that it is my

legal opinion that I cannot participate in this proceeding and still protect the rights of my clients. I would ask the Court, under these circumstances, to grant a continuance of one day so that I could at least have the opportunity to present a legal memorandum to the Court

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showing that the legal issues in this case, the trial judge does make decisions.

THE COURT: Mr. Dubin, you knew from last week what was going to happen today. You've had all weekend to work on it. I don't see where one more day would help. We'll proceed.

MR. DUBIN: I did not know as of Thursday morning, your Honor, that these things would happen, and that's two court days prior to today.

(End of bench conference.)

(Mr. Dubin left the courtroom.)

THE COURT: Mr. Dubin just left. Did he inform you, Mr. Bailiff, as to why he was leaving?

THE BAILIFF: Right now? No, he didn't tell me.

THE COURT: Did he inform any of the other attorneys as to why he was leaving?

MR. ICHIDA: I think Mr. Dubin is taking the position that it will prejudice his position if he participates in the proceedings in any way.

THE COURT: All right. Because of the fact that the plaintiff's attorney has left, the Court's going to enter a default. The Court is going to dismiss the plaintiff's action against the defendants with prejudice. As far as the counterclaim is concerned, the Court's going

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to enter a default, and Mr. Gibson, you may proceed with the proof this morning if you wish. As far as the cross-claim is concerned, the Court's going to dismiss the cross-claim because of the fact that the Complaint has been dismissed. All right?

MR. GIBSON: Thank you, your Honor. We are

ready to proceed.
THE COURT: The Court will, because of the fact that this has now turned into a proof hearing, the Court will excuse the jurors. Thank you for coming, and please report back to the jury pool.
(The prospective jurors were excused.)
THE COURT: For the record, I'd like the record to note that immediately after the bench conference, Mr. Dubin left the courtroom without sayng anything to anyone.
MR. ICHIDA: Excuse me Judge, just to clarify one thing, the Complaint was dismissed for failure — was dismissed?
THE COURT: Failure of prosecution because Mr. Dubin left.
MR. ICHIDA: And the Court is dismissing it on its merits?
THE COURT: Yes.
MR. ICHIDA: Thank you.

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THE COURT: All right, shall we take a short recess? I'd like a conference with Mr. Gibson and Mr. Ichida before we proceed with the proof.
(Recess had.)
THE COURT: Note the presence of Mr. Ichida and Mr. Gibson.
MR. ICHIDA: Excuse me your Honor, in view of the proceedings this morning and the chambers conference and that I gather Mr. Gibson will be proceeding with the counterclaim and the agreement of sale, may we be excused from attending or would you prefer that we remain?
THE COURT: Mr. Gibson?
MR. GIBSON: Either way, your Honor. I have no — As I understand —
THE COURT: The only thing we're proceeding on is your conterclaim.
MR. GIBSON: That's right, and I have no problem with Mr. Ichida being excused in this matter.

THE COURT: You're excused, Mr. Ichida.
MR. ICHIDA: Thank you.
(Mr. Ichida and Ms. Lee left the courtroom.)
MR. GIBSON: Your Honor, we would like to call as our first witness, Mr. Howard T. Lane.

HOWARD LANE

a defendant herein, called to testify on his own behalf,

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having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GIBSON:

Q Mr. Lane, could you please state your full and correct name.
A Howard Thomas Lane, now Senior.
Q What is your present residence address?
A 1600 Ala Moana, Suite 3300, Honolulu.
Q Are you a party to the matter of Leon D. Richardson, et. al., vs. Howard T. Lane, et. al.?
A Yes, sir. I'm the defendant.
Q Mr. Leon D. Richardson and his wife, Margie Richardson, are known to you to be citizens of Australia and residents of Hong Kong; is that correct?
A That's what they've told me.
Q The plaintiff, Copthorne N. V., is known to you to be a Netherland Antilles corporation; is that correct?
A That is correct.
Q On or about June 30, 1981, did you have occasion to enter into an agreement of sale with the Richarsons with respect to the premises at 10 Poipu Place?
A Yes, sir.
Q Mr. Lane, I'm handing you what has been marked as Exhibit A for identification and ask you if you can

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identify that document.
A Yes.
Q What is that document, sir?
A It's an agreement of sale.

Q Is that a recorded ocpy of the Agreement of Sale which is referred to in the Counterclaim?
A Yes.
Q You were the owner at that time of a leasehold interest in the premises at 10 Poipu Place?
A Yes, sir.
Q With respect to that Agreement of Sale, was the $500,000 down payment provided for in that Agreement of Sale paid to you?
A Yes, it was.
Q How many monthly installments were received by you
A He's delinquent. He paid up till February 11th of 1982, and he's been delinquent ever since. His interest is paid till February 11th, 1982.
Q So what you're saying is after February 11th, no further payments were made; is that correct?
A What really happened, he paid in February and — in late February or early March and that paid till February 11th.
Q So the March payment was not made. The

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February payment was made.
A That's right.
Q When that payment was not made, did you have occasion to request that a notice of default be sent to Copthorne and the Richardsons?
A Yes.
Mr. GIBSON: Your Honor, I request at this time that Exhibit A be received into evidence.
THE COURT: All right.

(Defendants' Exhibit A was received in evidence.)

Q (By Mr. Gibson) Mr. Lane, I'm handing what has been marked as Exhibit B for identification. Do you recognize those documents?
A Yes.
Q Were those documents sent pursuant to your

request?
A Yes.
Q Are those the notices of default which you previously referred to?
A Yes, sir.
Q Have you been able to calculate the amount of money which is owed to you under the terms of the Agreement of Sale at the present time?
A Yes. I believe I gave you the — we worked out

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the schedule the other day.
Q Can you provide the Court with a breakdown of those amounts, sir.
A Mike, you have the calculations.
Q You did prepare a schedule?
A Yes, sir.
MR. GIBSON: Your Honor, I'd request that Exhibit B be received into evidence at this time.
THE COURT: All right, Exhibit B will be admitted into evidence.

(Defendants' Exhibit B was received in evidence.)

Q (By Mr. Gibson) Handing you Exhibit C, Mr. Lane, is that the schedule which you previously referred to?
A Yes, sir.
Q Using that schedule, can you explain to the Court the amount of moneys that are presently due and owing under the Agreement of Sale.
A 1,253,113.82.
Q Explain to the Court how you came to that figure.
A Okay. There's interest, delinquent interest, from February 1st of '82 to January 13, 1983, equals $121,770.96. The property expense which is like the

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impound account was $4,599.46 that was due as of February 13th. The balloon payment was due February 13th in the

amount of $850,000, a total at that point, $976,370.42. That disregards late fees at 12 per cent and so forth based upon the Agreement of Sale.

Under Schedule B of this account — of this schedule, he's delinquent from January 13, 1983 through 1/13/84 of $132,040.80, and then he's delinquent again from January 13th, 1983 to January — pardon me, from 1/13/84 to 1/13/85, an additional $132,040.80, plus the property tax for the two years which is the impound account — is $5,485.86 or an additional $272,053.32.

If you take the two figures and put them together into what we call Schedule C, it amounts to 1,253,113.62 which is what he's presently delnquent.

Q Mr. Lane, have you had occasion to view the premises within the last year?

A No, sir.

Q Do you have some basis for a belief that it may be necessary to make certain repairs to the premises?

A Yes, sir.

Q What is that basis?

A The last deposition that I attended — I attended approximately three or four depositions at the property, and at the last deposition that I attended was in

1982. I believe, from memory, it was around January, February. Anyway, Mr. Richardson's deposition, whatever date that was. And at that time —

Q Mr. Lane, the lawsuit was filed in March of 1982.

A Oh, I'm sorry. I got my years screwed up. Let's see. '83 — two years ago. So that would be '83. It's two years ago or roughly that I saw the property last so it would be 1983, the early part of 1983.

Q What I'm trying to get at, maybe you could just explain it to the Judge, what it's going to fix the house up.

Q At this particular point, I don't think a real estate broker would sell the property unless the

allegations —

Q Just explain it to the Judge, Mr. Lane, how much it's going to take, in your opinion, to fix up the house.

THE COURT: Mr. Gibson, he hasn't seen the house for two years.

MR. GIBSON: I understand, but I think he can — if he works on it — explain why he thinks it's going to cost what he thinks it's going to cost.

THE WITNESS: Well, I think it's going to cost approximately $50,000 which means painting and putting the

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house back together because they've torn it up quite a bit. We're going to have to fix all the sliding doors and probably going to have to put in additional waterproofing because those were the allegations.

Q (By Mr. Gibson) Okay, you haven't been there for two years?

A Right.

Q How is it that you think that that's going to have to be the case?, Do you have any basis for that, Mr. Lane? That's my point.

A They're all run-down. All the screens are torn and worn out at the time I was out there.

Q What I'm saying is how do you know what it's like today? How do you know what it's been like for the last two years. Have you been reading transcripts of testimony?

A I've read some information that they've done a lot of tearing up of the house since the time that I've been to the house last.

Q So you believe, based on the testimony that you've read and your observations about two years ago, that it's going to take at least $50,000 to fix it up; is that correct?

A That's my opinion.

Q Have you incurred any expenses or do you expect

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to incur any expenses in the way of charges from the Bank of Hawaii?

A Yes, sir.

Q Could you give the Court an estimate of what those expenses are.

A I have a letter from the Bank of Hawaii dated January 2nd, 1985. I'd ask them to give me a recap of where they're at. It's relative to No. 0210-6. When I started, my principal at the bank was $348,754.08.

Q Excuse me, Mr. Lane. The question was what are the charges that you're going to incur from the Bank of Hawaii, attorney's fees?

A Well, I have attorney's fees. In the mortgage, it says I'll have to pay it. We have escrow advances of 3,579.29. That's 3,000. We have general ledger advances of 5,649.96, late charges of 4,368.16 and interest that I haven't paid so far to the bank. Am I suppose to include that or not?

Q No. What's the total that you expect to be charged the Bank of Hawaii, Mr. Lane, in addition to the interest that you owe?

A Probably about $20,000.

Q The Agreement of Sale provides for late fees of 12 percent; isnt' that correct?

A That is correct.

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Q And the $850,000 which was due has not been paid; isn't that correct?

A That's correct.

Q And have you calculated what the late fees on that $850,000 is at 12 percent per annum?

A I think you — Let me see if it's on this schedule.

Q When was it due?

A It was due in January 13, 1983.

Q So approximately two years ago?

A That's 12 percent per annum.

Q You say the monthly installments that were due but have not been paid amount to how much?
A Hundred and thirty-two — Well, I'll — there's three different series of figures, Mr. —
Q We're trying to make it simple.
A Okay.
THE COURT: You want a recess?
MR. GIBSON: No, your Honor. I'm almost finished.
Q Could you tell the Judge what the installments that were due that had not been paid were.
A From January 13 — I mean February 1 of '82 through January 13, '83 is 121,770.
Q Okay.

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A Okay. Then —
Q You've previously testified to the other numbers. Is it your understanding that the Agreement of Sale was assigned Copthorne N.V. and then reassigned from Copthorne back to the Richardsons?
A That's my understanding. I dont think it's been recorded, though.
MR. GIBSON: Your Honor, at this time, I'd request that Exhibit C be received into evidence.
THE COURT: All right.
(Defendants' Exhibit C was received in evidence.)
MR. GIBSON: Your Honor, I believe Exhibit B has also been received into evidence.
THE COURT: Yes.
Q (By Mr. Gibson) Handing you Exhibit D, what is Exhibit D, as far as you know?
A It's an assignment of agreement of sale form Copthorne back to the Richardsons dated 14, June of '83
Q You consented to the assignment of the agreement of sale from the Richardsons to Copthorne, did you not?
A Yes, I did.

Q Under that assignment, you preserved your rights against the Richardsons; isn't that correct?

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A That's correct. They personally guaranteed it.
Q You did not consent to the reassignment from Copthorne back to the Richardsons; is that correct?
A That's correct.
Q Have you incurred or do you expect to incur attoryney's fees in your defense of this case?
A Yeah. I have and I expect to have additional.
Q Could you give the Court an approxmate figure as to the amount of attorney's fees which have been billed to you in this case.
A At least $105,000.
Q That was as of what date?
A That was as of — I think it was last Friday.
Q In other words, the bill for December?
A Yes, sir.

MR. GIBSON: Your Honor, I'd request that Exhibit D be received into evidence.

THE COURT: All right. It's admitted into evidence.

(Defendants' Exhibit D was received in evidence.)

MR. GIBSON: Your Honor, I would call as my next witness —

THE COURT: You may step down, sir.

MR. GIBSON: — Mr. Willis Sinsabaugh.

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WILLIS SINSABAUGH,

a defendant herein, called to testify on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GIBSON:

Q Sir, could you please state your full name.
A My name is Willis Floyd Sinsabaugh.
Q What is your present residence address,

Mr. Sinsabaugh?
A 105 Popu Drive.
Q You are also a defendant in this case, are you not?
A I am.
Q Did you have occasion to assist Mr. Lane in the sale of the premises at 10 Poipu Place which is reflected in the Agreement of Sale, Exhibit A, to this proof hearing?
A I did.
Q In what capacity did you assist Mr. Lane?
A I was Mr. Lane's agent and broker.
Q Prior to assisting Mr. Lane in that regard, have you had occasion to be familiar with the premises at 10 Poipu Place?
A We listed the premises prior to Mr. Lane. We sold it to Mr. Lane.

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Q At the time you sold it to the Richardsons for Mr. Lane, what was the sale's price?
A 1 million — The sale's price was $1,450,000. Richardson paid 135 —.
Q Do you have an opinion today as to what the house is worth today, what the actual market value would be today?
A The market value of the house today, once it's refurbished to its original fine condition, would be somewheres around 1.2 million to 1.3 million. There are two other houses for sale.
Q I'm not asking you what it would be worth if it were restored. I'm asking you what it's worth today.
A Today? In its present condition?
Q Today.
A With the damages they're in?
Q Exactly as you know it to exist today.
A Less than a million dollars.
Q Approximately what amount, sir?
A Around 900 —.
Q Are you familiar with the value of real estate

in that area?
Q Yes, sir.
A And how is it that you familiar with the value of real estate in that area?

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A I've sold several houses in the area. I live in the area.
Q Do you specialize in any particular type of property?
A Primarily waterfront properties.
Q Is this a waterfront property?
A This is a waterfront property.
Q So your estimate as to the present market value is approximately $900,000?
A As I know the house today.
Q Today, that's correct. did you have occasion to receive a telex from Mr. Leon Richardson?
THE COURT: Mr. Gibson before you get on this subject, I don't know when he saw it last or how he comes about this knowledge.
MR. GIBSON: Very well.
Q Can you explain to the Court your basis for your belief that it's presently worth today approximately $900,000?
A I have not pysically been in the house for two years or approximately. The last time I was there, it was very deteriorated so to —
THE COURT: do you know what the condition of the house is today?
THE WITNESS: I have not been in the house for

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two years so the answer would be no.
THE COURT: Then, how can you say how much it's worth today?
THE WITNESS: I am assuming, assumption, that we have $50,000 for repairs, and if it was repaired and it was in its original —
THE COURT: This is an assumption on your part?

THE WITNESS: Yes.
THE COURT: Court's not interested in —
THE WITNESS: Assumptions?
THE COURT: — assumptions, that's right.
Q (By Mr. Gibson) Have you read the reports of various experts that have been retained by plaintiffs in this case?
A I have.
Q What do those reports reflect as to the condition of the house?
A It has considerable refurbishing to do and corrections, and without an assumption, the house is worth — if it was in reasonable condition, it's worth over a million dollars.
Q Is it worth, assuming that it's fixed up, in your opinion more than it sold for when it was sold to the Richardsons?
A No.

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Q Is it worth less than —
A It's worth approximately the same as.
Q Assuming that it were to be fixed up?
A Yes.
MR. GIBSON: Your Honor, may I proceed now into the area of the telex?
THE COURT: Sure.
Q (By Mr. Gibson) excuse me, if that house were to be sold today, Mr. Sinsabaugh, what would the commission be on the sale?
A It would be six percent of the gross.
Q And would there be other costs which the seller would have to pay in addition to the commission?
A The other costs would be his portion of the closing costs, the termite inspection or anything else that was put in the offer at the time of the sale.
Q What would the magnitude of a sale that we were talking about in this type of home, what kind of dollars are we talking about in addition to the commission?

A Approximately $2,000.
Q Handing you Exhibit E for identification, Mr. Sinsabaugh. Are you familiar with that document?
A Yes, I am.
Q How is it that you're familiar with that document, sir?

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A This document was received by me through my telex in my office.
Q Do you have any reason to believe that the allegations contained in that telex with respect to the activities of either you or Mr. Lane are true?
A No.
Q They are not true?
A They're not true.
MR. GIBSON: Your Honor, I have nothing of this witness and request that Exhibit E be received into evidence.
THE COURT: All right. Exhibit E will be received into evidence.
(Defendants' Exhibit E was received in evidence
MR. GIBSON: Your Honor, I have no further witnesses. I would like to briefly address the issue of the Agreement of Sale and the request that we are asking for.
THE COURT: All right
MR. GIBSON: Your Honor, we are asking in our Complaint that the Agreement of Sale be cancelled, that Mr. Lane be permitted to retain the funds held, that we be entitled to a writ of possession and that we be awarded attorney's fees and costs.

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Under the cases of Jenkins vs. Wise, Gomez vs. Pagaduan and Ventura vs. Grace, the Court has set forth the criterion under which the relief which I have just requested can be granted, and the Court has specified that in the situation where the liquidated damages are being

requested to be retained, the actual damages must be the same as or close to the liquidated damages.

The criterion that the court has used is as follows. Number one, "the excess of the contract price over fair market value at the time of the termination." The testimony is that at the very best, the property is not worth any more today than it was at the time it was sold, and that is the contract price. In fact, from the evidence, it is probably worth less and anywheres from $50,000 to possibly $400,000 less.

The second item to be used in computing or calculating the actual damages is interest due during the purchaser's equitable ownership. Mr. Lane has testified that the interest which is due is $127,000 — excuse me, $121,000. Those are the installments which were not paid but were due. The actual or estimated cost of resale of the property on the termination date, that being six percent of the property, assuming that it were worth 1.3 million dollars which we don't think it is, that would be approximately $80,000, your Honor.

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Any payment other than principal and interest required under the Agreement of Sale which the purchaser failed to make, Mr. Lane has testified that the taxes and other expenses amounted to approximately $4,500.

The late fees of 12 percent of any amounts unpaid would approximate $204,000. Actually, in access of that.

And any expenses or damages which the seller is entitled to recover under the purchaser's breach, this would include attorney's fees which I can relate to the Court are far in excess of $105,000, costs and expenses incurred which the Bank of Hawaii will assess which Mr. Lane has testified to.

Your Honor, I would submit that all of this infers that the buyer acted in good faith, and I think it would be advisable on my part if your Honor would be willing to do so, to let me put on Mr. Lane to point out

one other thing, and that is that the buyer in this case did act in bad faith. But I think rather than argue it before I have the evidence, may I reopen to put on —

THE COURT: All right.

MR. GIBSON: Mr. Lane, could you take the stand, please.

THE COURT: I don't think you covered Exhibit E with Mr. Lane.

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MR. GIBSON: Pardon me, your Honor?

THE COURT: I don't think you covered Exhibit E with Mr. Lane.

MR. GIBSON: You're right, you Honor.

HOWARD LANE,

resumed the stand ant testified further as follows:

DIRECT EXAMINATION (Resumed)

BY MR. GIBSON:

Q Mr. Lane, did you have occasion to be adivsed of the telex which was received?

A Yes.

Q Did that cause you any damages, actual, out of pocket dollars and cents?

A The whole scenario —

Q No. Just answer that question.

A No.

Q How did the telex affect you?

A Telex affected me in my whole complete lifestyle. The whole scenario is steps took place. It's not just the telex in itself. It's the — all the circumstances.

Q Can you explain what you mean by that.

A Well, there was a series of letters the man wrote. He wrote to the bank. He wrote to Mr. Sinsabaugh very derogatory letters. I was involved in a very large

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trial with my ex-wife, and I had an opportunity to — The case ran way over on the part of the plaintiff, and me as a defendant, unfortunately, I had two and a half days from a

six-week trial or they would have had a mistrial, but because I didn't have the income comng in, I couldn't afford to keep feeding that particular trial so I took a mistrial — I took a verdict, a jury verdict, and lost, and then since then, I've had to file Chapter 11 and protect the rest of my assets.

Q I'm handing you Exhibit — Did you have occasion to receive a letter dated February 8th from Mr. Richardson?

A I remember that letter.

Q In that letter, did Mr. Richardson indicate to you that he was going to fix up the house?

A Yes, sir.

Q Did Mr. Richardson in that letter indicate to you that the funds which were due under the Agreement of Sale would be put into a trust account for distribution upon the determination of who was obligated to make those repairs)

A That's correct.

Q Did Mr. Richardson make the repairs to the house?

A No, sir.

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Q Did Mr. Richardson or Copthorne put the money into the escrow account which they said they would do, so far as you know?

A I'm told they did.

Q Did you know whether they eventually withdrew those funds?

A Yes, they did.

Q And today, as far as you know, are those funds on deposit either in the court or in some bank in the State of Hawaii?

A No place we could put our hands on.

MR. GIBSON: Thank you. Your Honor, I'd request that the last exhibit be received into evidence.

THE COURT: All right.

(Defendant's Exhibit F was received in evidence.)

MR. GIBSON: I have no further questions of this witness, your Honor.

THE COURT: You may step down.

MR. GIBSON: Your Honor, what I believe we have established with respect to this proof hearing is that the actual damages, this does not include at all the principal of $850,000 which was not paid, but that the actual damages, the moneys that are due or the moneys that Mr. Lane will have to incur as a result of fixing the

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premises up, reselling it, and defending himself in this action and incurring the additional cost which the Bank of Hawaii has rendered against him because of him having not made the mortgage payments, will far exceed the $500,000 that was paid down, plus the monthly installments which are made of approximately $72,000.

THE COURT: The Court agrees with you on that point, based upon the figures that were submitted. Therefore, the Court will grant a cancellation of the Agreement of Sale and order that the property be returned to both Mr. Howard T. Lane. What happened to Margie Lane? She was on the Agreement of Sale also.

MR. GIBSON: She was on the Agreement of Sale as a buyer so we would cancel that Agreement of Sale Mr. Lane would be entitled to retain the —

THE COURT: Question: Do you have all the necessary parties?

MR. GIBSON: Yes, your Honor.

THE COURT: Are you going to cancel the Agreement of Sale?

MR. GIBSON: Mrs. Richardson is also a defendant in this action.

THE COURT: Let me see. All right, all right.

MR. GIBSON: So what we would ask for, your Honor, is a cancellation of the Agreement of Sale,

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retention of the funds, a writ of possession to issue forthwith, and leave to file a motion for attorney's fees and costs as the Court would deem reasonable.

THE COURT: All right. You may file an affidavit on the costs. However, the Court is inclined not to grant you $105,000 —

MR. GIBSON: Your Honor —

THE COURT: — unless it's in connection with the cancellation of the Agreement of Sale.

MR. GIBSON: Your Honor —

THE COURT: All right?

MR. GIBSON: I understand what your Honor is saying. I don't know if I'll be able to break that down — to what extent, I will. I will submit an affidavit, your Honor.

THE COURT: All right. Anything else?

MR. GIBSON: Nothing futher.

THE COURT: Excuse me. As far as the matter for the libel and slander is concerned, the Court will award each defendant $1.

MR. GIBSON: Thank you, your Honor. I think that's it.

THE COURT: Anything else?

MR. GIBSON: No.

THE COURT: All right.

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(The proceedings were concluded at 10:55 a.m.)

CERTIFICATE

I, Jonell Kaku, an official court reporter for the First Circuit Court, State of Hawaii, do hereby certify that I reported in machine shorthand all of the proceedings had in the above-entitled cause on Monday, January 21, 1985; and that the foregoing is a true and correct transcription of the notes so taken and transcribed by me to the best of my ability.

Dated this 23st day of January, 1985.

JONNELL M. KAKU, C.S.R. #138